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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.3899 OF 2010

The Commissioner of Income Tax-III,
M.K. Road, Aaykar Bhavan,
Mumbai – 400 20.

....Appellant

.Versus.

M/s.Aditya Birla Nova Limited (Successor),
In business to M/s.Birla Global Finance Limited,
Appejay House,
Shahid Bhagwat Sing Road,
Fort, Mumbai-400 023.

....Respondent

Mr.A.R. Malhotra with Ms.Padma Divakar for the Appellant.

Mr.J.D. Mistry, Senior Counsel with Mr.Atul K. Jasani for the
Respondent.

CORAM : S.J. VAZIFDAR AND
M.S. SANKLECHA, JJ.
DATE : 14TH AUGUST, 2012.

JUDGMENT (PER S.J. VAZIFDAR, J.) :-

1. This is an appeal under section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal dated 8.12.2009 dismissing the Revenue's appeal being ITA No.24/Mum/2006 and partly allowing the respondent's appeal being ITA No.85/Mum/2006 pertaining to the assessment year 2000-2001.

2. The appellant has sought to raise the following questions of law :-

“(A) Whether on the facts and in the circumstances and in law, the Tribunal was right in deletion of penalty to the extent of Rs.11,47,987/- as imposed by the A.O. on account of issue expenses under section 35D ?

(B) Whether on the facts and in the circumstances and in law, the Tribunal was right in deletion of penalty to the extent of Rs.9,49,399/- as imposed by the A.O. on account of diminution in value of shares investment ?”

3. The matter is clearly covered by the judgment of the Supreme Court in *CIT vs. Reliance Petroproducts Pvt. Ltd., (2010) 11 SCC 762 = (2010) 322 ITR 158*.

4. The respondent is a non-banking financial company. It claimed a deduction of Rs.11,47,989/- under section 35D of the Act which was disallowed on the ground that it is not an industrial undertaking. A similar claim had been disallowed during the previous years as well. The respondent also claimed a deduction of Rs.9,94,399/- on account diminution in the value of shares held by it. The same was disallowed on the ground that the shares were held as investments and profits and losses on the sale thereof were to be considered under the head “capital gains”.

5. The quantum proceedings inter-alia on these two issues were concluded against the respondent. The Assessing Officer also

initiated penalty proceedings under section 267(1)(c), which fall for consideration in this appeal.

6. The CIT (A) confirmed the penalty inter-alia in respect of the claim for deduction of Rs.9,94,399/-. In the result before the CIT (A), the respondent succeeded on the issue of penalty as regards question (A) referred to above but not as regards question (B). Accordingly, the appellant and the respondent filed appeals before the Tribunal which were disposed of by the impugned order. The Tribunal held in favour of the respondent on both these issues.

7. At the outset, we must, in fairness to Mr.Mistry, the learned senior counsel appearing on behalf of the respondent, state that we did not permit him to argue the question on merits even for the purpose of establishing prima-facie that the respondent had an arguable case although the quantum proceedings had been decided against it.

8. It is not the appellant's case that the respondent withheld any information or furnished any false information. The facts necessary for carrying out the assessment proceedings were admittedly disclosed in the return filed by the respondent.

9. The appellant's contention is that though all the necessary facts and particulars were disclosed and though no false statement had been made even in the return, the respondent had wrongly

claimed the aforesaid deductions despite the fact that it was not entitled to the same as a pure question of law. Mr. Malhotra, the learned counsel appearing on behalf of the appellant submitted that the levy of penalty even in such a case is mandatory. He relied upon section 271(1)(c) which, in so far as it is relevant to this appeal, reads as under :-

“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, or

- (a)
- (b)
- (c) has concealed the particulars of his income or furnished inaccurate particulars of such income.
- (d)

he may direct that such person shall pay by way of penalty, -

- (i)
- (ii)
- (iii) in the cases referred to in clause (c) [or clause (d)], [*in addition to tax, if any, payable*] by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income [or fringe benefits] or the furnishing of inaccurate particulars of such income [or fringe benefits].

Explanation 1 – Where in respect of any facts material to the computation of the total income of any person under this Act, -

(A)

(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.”

10. In support of his submission, Mr.Malhotra relied upon the following observations of the Supreme Court in *Union of India & Ors. vs. Dharmendra Textile Processors & Ors. (2008) 13 SCC 369 = (2008) 306 ITR 277 :-*

17. It is of significance to note that the conceptual and contextual difference between Section 271(1)(c) and Section 276-C of the IT Act was lost sight of in *Dilip Shroff case*.

18. The Explanations appended to Section 271(1)(c) of the IT Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in *Dilip N. Shroff case* has not considered the effect and relevance of Section 276-C of the IT Act. Object behind enactment of Section 271(1)(c) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276-C of the IT Act.

19. In Union Budget of 1996-1997, Section 11-

AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In Para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.”

11. The judgment does not support Mr.Malhotra’s submission that even if an assessee has disclosed all the particulars of his income and has not furnished inaccurate particulars of his income, it is mandatory upon the Assessing Officer to levy penalty under section 271(1)(c) if a claim is made which is held to be unsustainable in law. The Supreme Court merely stated that willful concealment is not an essential ingredient for attracting a civil law liability under section 271(1)(c) read with the explanation thereto. In other words, all that the judgment holds is that the concealment need not be willful to attract penalty. However to attract the provisions of section 271, the assessee must be held to have concealed the material particulars or to have furnished inaccurate particulars. At the cost of repetition in the present case, there was no concealment of any material particulars by the respondent. Nor did the respondent furnish inaccurate particulars. The respondent disclosed all material particulars and on the basis thereof, made certain claims which have been found purely as a question of law to be not sustainable.

In the present case, Explanation 1(B) is inapplicable. This is in view of the fact that it is an admitted position that the respondent

has neither concealed any particulars of income nor furnished inaccurate particulars of income. Explanation 1(B) would apply only where an assessee has concealed the particulars of his income or has furnished inaccurate particulars of income. Explanation 1(B) provides that in such cases if the reasons given for the concealment or furnishing of inaccurate particulars of income are found to be unsubstantiated or not bona-fide, the amount added or disallowed in computing the total income would represent income in respect of which particulars have been concealed.

12. As we noted earlier, the matter in any event stands concluded in favour of the respondent by the judgment of the Supreme Court in *CIT vs. Reliance Petroproducts Pvt. Ltd.* (supra) where the Supreme Court considered a similar situation. The respondent therein had disclosed all the facts and there was no concealment of income. The Supreme Court negated an identical submission. The judgment considers and interprets the judgment of the Supreme Court in *Union of India & Ors. vs. Dharamendra Textile Processors & Ors.* (supra). The Supreme Court after setting out Section 271 (1)(c) in paragraph 10 held as under :-

“10.

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.

11. 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) 9 SCC 589*, where this Court was considering the same provision, the Court observed that the assessing officer 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 *Union of India v. Dharamendra Textile Processors* as also the decision in *Union of India v. Rajasthan Spg. & Wvg. Mills* and reiterated in para 13 that: (*Atul Mohan Bindal case*, SCC p. 597, para 13)

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

19. It was tried to be suggested that Section 14-A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form part of the total income. It was, therefore, reiterated before us that the assessing officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income.

20. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the assessing officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the legislature.

21. In this behalf the observations of this Court made in *Sree Krishna Electricals v. State of T.N.* (2009) 11 SCC 687, as regards the penalty are apposite. In the aforementioned decision which pertained to the penalty proceedings in the Tamil Nadu General Sales Tax Act, the Court had found that the authorities below had found that there were some

incorrect statements made in the return. However, the said transactions were reflected in the accounts of the assessee. This Court, therefore, observed: (SCC p. 688, para 7)

“7. So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's accounts books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption penalty cannot be imposed. The penalty levied stands set aside.”

The situation in the present case is still better as no fault has been found with the particulars submitted by the assessee in its return.” (emphasis supplied)

The Supreme Court also held that it was only on the point of mens-rea that in *Union of India & Ors. vs. Dharmendra Textile Processors & Ors*, the Supreme Court over-ruled the earlier judgment of the Supreme Court in *Dilip N. Shroff vs. Jt. CIT*, (2007) 291 ITR 519.

13. Mr.Malhotra submitted that Explanation 1(B) to Section 271(1) mandates the levy of penalty even where a claim for deduction is not upheld, even though the assessee has disclosed all material facts and has not suppressed any material facts. He submitted that a view to the contrary would render explanation 1(B) nugatory. His only response to the judgment of the Supreme Court in *CIT vs. Reliance Petroproducts Pvt. Ltd.* was that the Supreme

Court had failed to notice Explanation-1 to section 271(1).

14. We are unable to agree. In any event we are bound by the judgment of the Supreme Court. Merely because the Explanation was not referred to in the judgment of the Supreme Court in *CIT vs. Reliance Petroproducts Pvt. Ltd.*, it cannot be said that the judgment is *per-incuriam*. The learned Judges having expressly considered the very section, it can hardly be suggested that they did not notice a part of the section and delivered the judgment in ignorance thereof merely because that part is not in terms noted in the judgment.

15. The appeal does not raise a substantial question of law.

16. The appeal is accordingly dismissed. No order as to costs.

(M.S. SANKLECHA, J.)

(S.J. VAZIFDAR, J.)

