

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

% *Reserved on: 12th September, 2012*
Date of Decision: 5th November, 2012

+ **ITA 1696/2006**

COMMISSIONER OF INCOME TAX DELHI-VIAppellant
Through: Ms. Suruchi Aggarwal, Sr. Standing
Counsel.

Versus

USHA INTERNATIONAL LTD.Respondent
Through: Mr. S. K. Aggarwal, Advocate.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

On 07.03.2007, the following substantial question of law was framed under Section 260A of the Income Tax Act, 1961 ('Act', for short):

"Whether the Income Tax Appellate Tribunal was correct in law in deleting the penalty imposed on the Assessee under Section 27(1)(c) of the Income Tax Act, 1961?"

2. The assessee, which is the appellant, is a public limited company. It filed a return of income for the assessment year 1983-84 on 20.06.1983 declaring an income of ₹80,52,020/-. A revised return was filed on 05.12.1983 declaring income of ₹90,50,770/-. Another revised return was filed on 05.03.1985 declaring an income of ₹91,28,350/-. In making the assessment under Section 143(3) of the Act, the assessing officer noted that the assessee had made a claim for deduction of ₹10,00,000/- in terms of Section 35CCA in the original return filed on 20.06.1983, which represented a donation purportedly made to Shri Morarjibai Desai Grammonati Trust. He further noted that this claim was withdrawn in the revised return of income filed on 05.12.1983. According to the assessee, the claim was

withdrawn in the revised return because “certain facts have come to our notice which show that this donation of ₹10,00,000/- may not have reached the Trust”.

3. The assessing officer further observed that the assessee had filed the revised return of income withdrawing the claim for deduction only as a result of survey action taken by the income tax department on 06.10.1983 under Section 133A of the Act in the assessee’s premises, in the course of which the cash book maintained by the assessee was impounded as it contained the entry made for the donation, which was bogus as revealed by a series of searches conducted by the income tax authorities under Section 132 of the Act in the premises of certain persons stated to be connected with “the racket of making false claim under Section 35CCA in respect of certain donations”. It was in the course of such investigation that the tax authorities came to know that even the donation made by the assessee was bogus, which prompted them to conduct a survey on the assessee’s premises on 06.10.1983. It was further noticed by the assessing officer that the assessee knew that the trust was not genuine but still proceeded to make the donation only to claim a false deduction under Section 35CCA and thereby to reduce its taxable income. The donation was found to have been made by the assessee by means of a cheque which was initially crossed as “account payee only”, which was later cancelled under the signature of the Manager (Accounts) and the senior advisor of the assessee company to ordinary crossing (“& Co.”). This act, according to the assessing officer, showed the involvement of the assessee in the making of bogus donations with a view to reducing the taxable income. He accordingly disallowed the claim in the assessment order passed on 30.09.1982. The disallowance was accepted by the assessee.

4. Penalty proceedings for concealment of income were initiated under Section 271(1)(c) of the Act. The assessee’s explanation was called for and after examining the same, the assessing officer came to the conclusion that the assessee concealed its income as well as furnished inaccurate particulars thereof, by making a bogus claim of deduction under Section 35CCA in the original return filed on

28.06.1983. He accordingly imposed the maximum penalty of ₹13,00,000/-, being 200% of the tax sought to be evaded.

5. Aggrieved by the levy of penalty the assessee successfully appealed to CIT (Appeals), whose order was taken in appeal by the Revenue before the Tribunal in ITA No.1564/Del/2002, which, by the impugned order dated 30.08.2005 confirmed the cancellation of the penalty.

6. The Revenue is aggrieved by the order of the Tribunal and has preferred the present appeal. A perusal of the penalty order passed by the assessing officer on 22.03.1993 discloses certain further facts relating to the claim of deduction. It shows that a statement was recorded from one Vipin Mehra, who was the authorised representative of the trust and to whom the assessee had handed over the cheque. The statement was recorded under Section 131 of the Act on 04.03.1986 in order to verify the contents of his affidavit dated 21.11.1983 filed in support of the assessee's claim. A search was conducted under Section 132 of the Act at the residential premises of both Vipin Mehra and one Prem Prakash; the documents found during the search revealed that a number of companies were involved in systematical by claiming benefits under Sections 35(2A), 35(1)(ii) and Section 35CCA of the Act in order to reduce their taxable income, without actually making any genuine donation to the approved trust/ institution. The total amount of donation made in this way by the group of companies under the same management was about ₹1,00,00,000/- during the period from May, 1982 to September, 1983. The modus operandi was to issue cheques crossed as "account payee only" and to cancel the special crossing later and change it to a simple crossing under the signature of the company's authorised signatory. The cheques were later endorsed in favour of certain third parties by forging the signature of the persons authorised to sign on behalf of donee institutions and deposit them in the account of the third parties, only to withdraw the cash later by issue of bearer cheques soon after the proceeds of the donation cheques were credited in the account. The search also revealed that this modus operandi was later changed and

bank accounts used to be opened in the name of the trust and institutions themselves in which the cheques were deposited, only to be withdrawn later by issue of bearer cheques. According to the assessing officer, the assessee was one of the companies of the group of companies which indulged in such modus operandi. The assessee, after issuing the cheque in favour of the trust based in Ahmedabad got the cheque encashed by opening a bogus account of the trust. The cheque was signed by one R. K. Wadhwan Manager (Accounts) and one K.P. Pillai, Senior Advisor. The cheque was drawn on Allahabad Bank, New Delhi. Subsequently the special crossing as “account payee only” was changed and it was converted into an ordinary crossing (“& Co.”). A fictitious account in the name of donee – trust was opened in State Bank of Patiala, Delhi Branch in which the cheque was deposited. The proceeds were credited on 09.07.1982 to the fictitious account. The cheque had been handed over to Prem Prakash, one of the persons in the Board of Directors, who handed over the cheque to Vipin Mehra. Within a week’s time, the assessee received a receipt in the Dak.

7. Simultaneously with the opening of the bogus account in the name of the trust, another account was opened in the same bank in the name of one C. L. Swamy in his capacity as the Secretary of trust by making a cash deposit of ₹1,000/-. His signature was attested by one Mr. P. P. Verma, a school teacher at New Delhi. His wife was the proprietor of a firm by name M/s. Pushpam Investment Company in whose name an account had been opened on 12.06.1982 in State Bank of Patiala, Delhi. Investigation made by the income tax authorities revealed that this account was opened at the instance of Prem Prakash c/o. M/s. Usha International Ltd. Inquiries were made with the donee – trust and they revealed that no person in the name of C. L. Swamy was connected with the trust and thus it was realised that the account opened in the State Bank of Patiala, Delhi in the name of C. L. Swamy was bogus. This account was used to encash the donation cheque of ₹10,00,000/-. After the proceeds were credited to this account, four self cheques were made out by C. L. Swamy, P. P. Verma and Subhash Chandra all connected to the assessee company and the amount of

₹10,00,000/- was withdrawn. When the purpose was achieved, the account was closed on 13.08.1982. In addition to the aforesaid facts noted in the penalty order the assessing officer has also referred to the fact that during the survey of the assessee's premises under Section 133A on 06.10.1983, the cash book maintained by the assessee, containing the entry regarding the donation was found and it was noticed that though the entry was made for the donation, the name of the donee had not been mentioned in the cash book. In the ledger, the name of the donee in respect of the donation of ₹10,00,000/- was missing in the donation account. However, a voucher No.408 dated 03.07.1982 prepared in respect of the donation was found, which contained the name of the trust.

8. The assessing officer also referred to the fact that the original return was filed on 28.06.1983, about four months before the date of survey/ impounding of cash book and it was only after the survey that the assessee chose to file a revised return on 05.12.1983 withdrawing the claim for deduction under Section 35CCA. Apparently he wanted to stress the point that the revised return was not filed voluntarily but was filed only when the assessee was cornered and evidence had been collected by the income tax authorities regarding the falsity of the assessee's claim.

9. The assessing officer further referred to the fact that donations were made by the assessee in the past but they were not of huge amounts and it was only in the year under consideration that a substantial amount of ₹10,00,000/- was donated to Morarjibai Desai Grammonati Trust and ₹40,00,000/- to Aparna Ashram, New Delhi.

10. In the course of the proceedings before the assessing officer it would appear that an affidavit dated 28.11.1983 was obtained from Vipin Mehra which showed that after withdrawing the amount of ₹10,00,000/- from the bank, a part of it was kept in one of the lockers and part of it was invested in bearer bonds, etc. It was also noticed that no proceedings or action was taken by the assessee company against Vipin Mehra despite the attempt to show that the assessee was also

victimised. A search of Mehra's residence was again made on 26.11.1983, but no bearer bonds were found in his possession.

11. The assessing officer further noticed that the assessee had not made any donations of such magnitude in the past and that there was undue haste in obtaining the approval of the Board of Directors; the approval was granted in an extra ordinary general body meeting of the shareholders held on 26.03.1982 to make an additional donation up to ₹35,00,000/- over and above the limit of ₹5,00,000/-. It would appear that the board authorised the director, Charat Ram to make the donation. Apparently, the assessing officer was trying to drive home the point that it was unusual for a company to convene an extra ordinary general body meeting to obtain an authorisation for making donation.

12. Taking into consideration the cumulative effect of the aforesaid facts, the assessing officer came to the conclusion that the assessee concealed its income as well as furnished inaccurate particulars thereof by making a bogus claim of deduction under Section 35CCA in the original return filed on 28.06.1983. The CIT (Appeals) referred to certain orders of the Tribunal in other cases where penalty imposed under the similar circumstances was cancelled and following those orders, cancelled the penalty in the present case also. He did not give any independent reasons on the facts of the present case for cancelling the penalty. The Tribunal endorsed the finding of the CIT (Appeals) and based its conclusion on an order of Tribunal in the case of Deepak Singh and family reported in 48 ITD 465, which was also a case where a claim of deduction was made under Section 35 CCA in respect of donations made through Vipin Mehra and Prem Prakash. It appears that in that case the Tribunal had cancelled the penalty on the ground that the filing of the revised return before any concrete evidence was gathered by the income tax authorities would exonerate the assessee from any guilt. It was on this basis that the Tribunal in the present case endorsed the finding of the CIT (Appeals). The Tribunal also did not examine the facts of the present case but chose to rely on another order of the Tribunal in which the modus operandi

adopted by that assessee was the same and the persons involved were also the same, namely, Vipin Mehra and Prem Prakash.

13. In the aforesaid backdrop of facts, it is for our consideration whether the Tribunal was right in endorsing the conclusion of the CIT (Appeals) that the penalty imposed was not justified. On a careful consideration of the matter, we are of the view that the Tribunal was not right in upholding the cancellation of the penalty. It cannot be denied that there were searches and investigations which resulted in the income tax authorities unearthing a concerted design to enable the reduction of the taxable income of income tax assesseees by making use of the provisions of Section 35(2A), Section 35(1)(ii) and Section 35CCA of the Act. The modus operandi adopted as outlined in the penalty order passed by the assessing officer, need not be repeated here. Suffice to note that the assessee made a donation of ₹10,00,000/- to Morarjibai Desai Grammonati Trust, Ahemdabad by cheque and subsequently got the cheque encashed through a bogus account opened in the bank for the said purpose. We have already referred to the facts narrated in the penalty order. The key persons involved have also been found to be common in all such cases. These persons are Vipin Mehra and Prem Prakash. It has also been found that though the donation was made by a cheque which was crossed “account payee only”, the special crossing was later changed to a simple crossing i.e. “& Co.”. The change was made under the signatures of R. K. Wadhwan, Manager (Accounts) of the assessee company and K. P. Pillai, Senior Advisor to the assessee company. The proceeds of the cheque were collected by the State Bank of Patiala, Delhi on 09.07.1992 and credited to the account opened in the name of one C. L. Swamy on 07.07.1982. C. L. Swamy was described as the Secretary of the donee – trust and his signature was attested by P. P. Verma in the account opening form. P. P. Verma was a school teacher in New Delhi. His wife Pushpa Verma was the proprietor of M/s. Pushpam investment company which had opened an account in the same bank on 12.06.1982. The investigation revealed that the account of Pushpam Investment Company had been opened at the instance of “Prem Prakash c/o. M/s. Usha International Ltd.” The income tax authorities

made inquiries with the donee – trust which revealed that no person in the name of C. L. Swamy was connected with the trust. This established that the bank account had been opened in a fictitious name merely for the purpose of misappropriating the amount of ₹10,00,000/- allegedly donated by the assessee to the trust. Further evidence is supplied by the fact that the entire amount of ₹10,00,000/- was withdrawn by issue of four “self” or bearer cheques signed by the C. L. Swamy, P. P. Verma, Subhash Chandra, etc. between 10.07.1982 and 17.07.1982. Finally the account was closed on 13.08.1982. The above facts show that the purpose for which the account was opened in the bank was only to take away the amount of ₹10,00,000/-, purportedly given as a donation to the donee – trust in order to claim the relief under Section 35CCA which would reduce the taxable income of the assessee. The amount never left the coffers of the assessee; it also did not reach the donee – trust. It was brought back to the assessee. However, a receipt had been filed by the assessee company purporting to be issued by the donee – trust. Obviously the genuineness of the receipt, in the background of the facts and circumstances, was open to serious doubts.

14. The contention of the learned counsel that the assessee was also a victim of a fraud played by several persons acting in concert cannot be accepted because the special crossing in the cheque was converted or altered into an ordinary crossing by the assessee’s Account Manager and Senior Advisor who had also affixed their signatures. There is no denial by the assessee company that they were not acting on its behalf. No proceedings, civil or criminal have been taken against them. No proceedings have also been taken against Vipin Mehra even though it is the case of the assessee that he was falsely representing that he was connected to the trust. Moreover, Prem Prakash who is referred to as a director of the assessee company was also involved in opening the bank account in the name of Pushpam Investment Company with State Bank of Patiala, Delhi on 12.06.1982. It is significant that this account belonged to Smt. Pushpa Verma wife of P. P. Verma, who attested the signature of C. L. Swamy in whose name an account was opened on 07.07.1982 in the same bank. Prem Prakash, while assisting Smt. Pushpa Verma in opening the

bank account had described himself as Prem Prakash c/o. M/s. Usha International Ltd., which is the assessee.

15. It is also significant to note that the cash book did not contain the name of the donee, though an entry had been made regarding the donation. Even in the donation account appearing in the assessee's ledger the name of the donee had not been entered when the survey was conducted on 06.10.1983 in the assessee's premises. However, the voucher No.408 prepared in support of the donation contained the name of the trust. The survey authorities impounded the cash book.

16. The further contention of the learned counsel for the assessee that the revised return withdrawing the claim for deduction under Section 35CCA was filed on 05.12.1983 voluntarily and without any prompting or provocation from the income tax department is not acceptable. The survey of the assessee's premises under Section 133A took place on 06.10.1983, two months prior to the date of filing the revised return. The survey itself was a result or as a follow up action to the searches and other inquiries conducted earlier. The cash book of the assessee was impounded during the survey for reasons stated in the preceding paragraph. The proceeds of the donation cheque had already been taken out of the bank account opened in the name of C. L. Swamy between 10.07.1982 and 17.07.1982. The account itself had been closed on 13.08.1982. In the light of these facts, the contention that the revised return was filed voluntarily is untenable. It was provoked by the evidence collected by the revenue and the survey conducted in the assessee's premises on 06.10.1983. In other words the revised return was filed by the assessee only when it was cornered and the income tax authorities had collected material on the basis of which it could be said that the claim for deduction was false or bogus. The filing of the revised return is thus an act of despair and the assessee can gain nothing from it.

17. The judgment of a Division Bench of this Court in *Qammar-Ud-Din & Sons v. Commissioner of Income Tax*, (1981) 129 ITR 703, heavily relied upon by the counsel for the assessee, cannot come to its aid since in that case the assessee

was not able to set out its correct income in the original return on account of certain handicaps but even before the assessing officer could investigate into the matter or discover anything wrong with the accounts or return, the assessee came forward with the correct figure of profit and loss account. In this situation it was observed by this Court that though there was certain amount of carelessness on the part of the assessee while filing the original return, but before the department discovered anything remiss therein, the assessee came forward with a true disclosure. The facts are thus very different from the present case. We are not to be understood as holding that the conduct of the assessee after filing the original return is not relevant at all. In fact we respectfully agree with the earlier judgment of this Court that the subsequent conduct of the assessee after filing the original return is relevant and that should be taken into account while judging the guilt of the assessee. It would however depend on the facts and circumstances of the each case as to whether the filing of the revised return of income would purge the assessee of any guilt and would avail him in penalty proceedings. The condition is that the revised return should have been filed before the department discovered anything remiss therein or before any material was gathered by the assessing officer which would throw doubts on the bonafide of the assessee.

18. The other judgment relied upon on behalf of the assessee before us is that of a learned Single Judge of this Court in *Sarvaria v. CWT*, (1986) 158 ITR 803. There it was held that merely because there was a survey of agricultural properties showing that the assessee also owned agricultural lands, he could not be said to be under a constraint to make full disclosure of his net wealth. It was observed that the survey report cannot be equated with seizure of books of accounts of assessee or a search of his premises. It was also observed that if a return was filed before issue of a notice of inquiry and if the authorities had not detected any concealment in the return earlier filed, the revised return should be considered to be voluntary for the purpose of invoking the powers of waiver exercisable by CWT under Section 18(2A) of the Wealth Tax Act, 1957. We have to understand and appreciate this judgment in the light of the facts therein. The Court was concerned

with Section 18(2A) of the Wealth Tax Act which granted the power to the CWT to waive penalty imposable for delay in filing the wealth tax returns. This Court held that so long as no concealment was dictated, the mere fact that a survey had been conducted on the assessee's premises does not detract from the fact that the revised return filed was voluntary. The judgment itself makes a reservation in cases where concealment had been detected in the original return. In such case, the revised return cannot be said to be voluntary. This decision in substance would go against the present assessee for the reason that here there was enough material gathered by the revenue authorities to show that the assessee had made a false or bogus claims of deduction under Section 35CCA in the first return, and had also impounded the cash book of the assessee where the entry for the donation had been made, though without the name of the donee being mentioned therein or in the donation account in the ledger. The materials referred to in the penalty order, to which we also have made a reference, prima facie show the guilt of the assessee; the revised return filed by it on 05.12.1983 cannot, therefore, be considered to be voluntary, even on the basis of the judgment of the learned Single Judge of this Court (supra).

19. The two judgments of this Court cited above show that the question whether a revised return filed by the assessee withdrawing a claim or offering additional income was voluntary or not is essentially a question of fact to be decided in the light of the entire material brought on record and the facts and circumstances of each case and particularly having regard to the fact whether the revised return was filed by the assessee when cornered by the evidence or material collected by the revenue authorities or before that stage. However, as noted by the Madras High Court in *CIT v. Ramdas Pharmacy*, (1970) 77 ITR 276, the filing of a revised return "will not expatiate the contumacious conduct if any, on the part of the assessee in not having disclosed the true income in the original return"; and it was observed at the same time that the Court was "not willing to accept the contention put forward on behalf of the revenue that the filing of the second return is of no consequence at all", while considering the liability of the assessee under

Section 28(1)(c) of the old Act (now Section 271(1) (c) of the 1961 Act). The Madras High Court proceeded to observe that it is not possible to construe the original return alone in isolation without reference to the conduct of the assessee subsequent to the filing of the original return and that all the facts and circumstances commencing with the filing of the original return and ending with the assessment may be taken as relevant for considering the liability of the assessee for penalty.

20. In the judgment by a Division Bench of this Court in *CIT v. S.A.S. Pharmaceuticals*, (2011) 335 ITR 259 the factual position was different. A survey was carried out at the business premises and godown of the assessee on 06.01.2003 during which certain discrepancies in cash, stock and renovation details were found. The assessee surrendered an amount of ₹88.14 lakhs during the survey on account of the discrepancies. However, at the time of the survey, the assessee was not under any obligation to file the return of income for the year ended 31.03.2003 as he still had time to do so. In the return filed for the assessment year 2003-04, relevant to the year ended on 31.03.2003, the assessee included the surrendered amount and filed a return of income declaring ₹87.71 lakhs. The assessment was made including the surrendered amount obviously on the basis of return filed. Penalty proceedings for concealment of income were initiated on the ground that the surrender was made during the survey only when the discrepancies were brought to the notice of the assessee. The assessing officer was of the view that had there been no survey the assessee would have succeeded in concealing the income and evading tax. The CIT (Appeals) and the Tribunal held that it was not a case of concealment of income as the surrendered income had been included in the return filed by the assessee. This Court upheld the finding of the Tribunal holding that there could not be any penalty on the basis of assumptions, surmises and conjectures and since the assessee had included the surrendered income in the return filed, there was no non-disclosure or concealment which could be penalised. This decision is not a case of revised return. It, therefore, does not have any relevance to the present case.

21. Both the CIT (Appeals) and the Tribunal, with respect, have not examined the facts of the present case in the manner expected of them. The Tribunal has merely based its conclusion on certain previous orders without any discussion of the facts of the present case. The question of concealment of income and whether the revised return was filed voluntarily or not is a question of fact to be examined and decided upon the facts and circumstances of the each case and, therefore, it was not permissible to the Tribunal to merely rely on earlier orders where this issue was considered and penalties were cancelled. It may be that in those cases also similar claims for deduction were involved; nevertheless, the question of concealment and the relevance of filing a revised return withdrawing the claim for deduction are all fact – dependent, and merely because in one case it was held that there was no concealment, it does not follow, as a matter of law, that in all such cases penalty cannot be imposed. At best, those earlier cases could only have a persuasive value. We are of the view that the Tribunal has committed an error in upholding the order of the CIT (Appeals) cancelling the penalties, without assigning any valid reason and without examining the facts.

22. For the above reasons we reverse the order of the Tribunal and hold that the penalty under Section 271(1)(c) was rightly imposed; the substantial question of law is answered in the negative, in favour of the Revenue and against the assessee. The penalty order passed by the assessing officer on 22.03.1993 is restored and the appeal filed by the Revenue is allowed. The assessee shall pay the costs of the revenue, which we assess at ₹20,000/-.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

NOVEMBER 5, 2012
hs