

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

% Date of reserve: 21.05.2009
Date of decision: 02.07.2009

+ **Crl.M.C. 2856/2001**

M/S HINDUSTAN CARBIDE PVT. LTD. ...PETITIONER
Through: Mr. Raman Gandhi, adv.

Versus

O.P. SALUJA ...RESPONDENT
Through: None

+ **Crl.M.C.1898/2001**

M/S ALLENA AUTO INDUSTRIES (P) LTD. ...PETITIONER
Through: Mr. Raman Gandhi, adv.

Versus

SH. J.R. BAROLIA, DY. CIT ...RESPONDENT
Through: None

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers
may be allowed to see the judgment? YES
2. To be referred to Reporter or not? YES
3. Whether the judgment should be
reported in the Digest? YES

: **MOOL CHAND GARG, J.**

1. Both these petitions have been filed by the petitioners under Section 482 of the Code of Criminal Procedure (Cr.P.C.) for quashing of criminal complaints filed against them separately under Section 276(c)(1), Section 277 read with Section 278 B of the Income Tax

Act, 1961 before the ACMM, Delhi where charges were also framed against both of them. According to the petitioners after the adjudication of departmental proceedings finally in which they have been exonerated of the allegations made against them on the basis of which departmental proceedings were initiated, the continuation of the complaint becomes an abuse of the process of Court and as such the complaints which are pending in the Court of ACMM including the charges framed against them are liable to be set aside by exercising powers vested in this Court under Section 482 Cr.P.C.

2. After the orders were passed in departmental proceedings by the Income Tax Appellate Tribunal in their favour both the petitioners moved application for dismissing of a complaint and discharging them under Section 245(2) of the Cr.P.C. However, the application so filed by both of them was dismissed by the ACMM by the order dated 19.03.2001 and 13.11.2000 respectively. It is thereafter the petitioners have approached this Court by way of the present petition.

3. The petitioners have relied upon various judgments delivered by the Apex Court including the judgment delivered in M/s Bandhu Machinery Pvt. Ltd. Vs. Asstt. Commissioner of Income Tax, New Delhi, Crl.A.368/2003 decided on 10.03.2003 as well as the judgment delivered by a learned single judge of this Court in the case of Sunil Gulati Vs. R.K. Vohra & Ors. 2007 (1) JCC 220 and by this Court in the case of M/s The Printer House Pvt. Ltd. Vs. Nishi Singh 2009 (2) JCC 1279 where a view has been taken that once departmental proceedings exonerates the petitioners who are called

upon to face the criminal trial also on similar allegations for which a departmental proceedings have been initiated, no fruitful purpose is served if the criminal complaints are left to be proceeded with.

4. On the other hand, the respondents have contested the submissions made on behalf of the petitioners. They have relied upon the provisions contained under Section 278E of the Income Tax Act which was introduced in the Act in 1986. It is submitted that in view of the said provision under the Act the petitioners who tried to conceal their income initially are not entitled to any benefit of departmental adjudication and are required to prove their innocence before the ACMM concerned. For the sake of reference provisions contained under Section 278E are reproduced hereunder:

278E. Presumption as to culpable mental state:- (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charges as an offence in that prosecution.

Explanation.-In this sub-section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

5. In the case of M/s Hindustan Carbide Ltd. after passing of the order by the Income Tax Appellate Tribunal dated 17.06.1999, the petitioner moved an application before the Court of ACMM but the ACMM vider order dated 19.01.2001 dismissed the applicatiion filed under Section 245(2) of the Cr.P.C. for discharge of the accused persons in the complaint. It would be appropriate to take note of

the observations made by the ACMM in the impugned order which would throw light about the allegations made against the petitioners as well as the orders passed by the departmental authorities to appreciate as to whether the present case is covered under Section 278E of the Income Tax Act or not.

6. The ACMM in his order dated 19.01.2001 made the following observations:

An application has been moved under Section 245 (2) Cr.P.C. for discharge by the accused persons from the complaint filed under Section 276-C(1) and 277 of the income-tax Act. The complaint has been filed on the allegations that for the assessment year 1989-90 accused no.1 filed its return of income on 29.12.1989 declaring a loss of Rs. 10,64,030/-. After claimed deduction under Section 80-HHC of the Income-tax which were available on the total income but the accused persons claimed deduction on gross income and manipulated so as to reduce their tax liabilities.

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Arguments were heard on behalf of the complainant as well as accused and complainant has also filed reply to the application. Perused the order dated 17.06.1999 passed by the Income Tax Appellate Tribunal and I find that penalty imposed has been cancelled on the reasoning of a cleavage of judicial opinion at the relevant point of time but the quantum addition made by the Assessing Officer has been upheld and in the mean time, one witness has also been examined on behalf of the complainant. Accordingly, I find that there is no substance in the application moved on behalf of the accused for their discharge as in the light of prosecution evidence, it is to be determined whether there is sufficient ground of charging the accused. Hence, application accordingly moved is dismissed. Case is adj., to 18.04.2001 for remaining pre-charge evidence if any.

7. It would also be appropriate to also take note of the order passed by the Income Tax Appellate Tribunal which is as under:

4. The learned counsel for the assessee vehemently argued that the claim of the assessee was bonafide. It was based on the certificate issued by the Chartered Accountant as per rules. Apropos the working of the claim under Section 80-HHC, there was cleavage of judicial opinion. The working of the Chartered Accountant was based on the interpretation of the provision. The interpretation so made was also a viable interpretation. There was no mens rea in making such claim. Even at 154 stage, the assessing officer accepted

the working so done by the Chartered Accountant. At one stage, he also agreed to the interpretation made by the assessee. Reliance was also placed on the decision of Tribunal rendered in the case of Harshvardhan Chemicals & Minerals Ltd. Vs. DCIT 58 Taxman 234 wherein the Tribunal held as under:-

If an assessee interprets the law in a particular way disclosing all the relevant facts in the return so that if the legal position taken by him is not accepted, full tax could be imposed, it could not be said that the assessee had filed a false return. The mere rejection of the explanation or claim of the assessee does not show that it was false. Deduction under section 80-HH could be arguable contestable or debatable. In such a situation, the claim could not be said to be false. If this were not so, it would become impossible for any assessee to raise any claim or claim any deductions which are debatable. It is not certainly the intention of the legislature to make such claim or deductions punishable under Section 271(1)(c) if they are not accepted. Further, in the instant case, the total income as per the original and revised computation of the assessee as also after the final assessment remained the same. So also the income-tax as computed by the assessee in both the returns and as computed on the basis of final assessment remained the same. In such a situation, therefore, when no further tax was payable, the question of concealment or computation of any penalty could not arise. Therefore, in the instant case, the penalty imposed was not right and the same was deleted.

5. Concealment for the purpose of Section 271(1)(c) must be conscience concealment. Conscience concealment would mean concealment which is not incidental or unintentional, but concealment with a guilty mind to evade or avoid tax. Thus, for the purposes of bringing a case within the said sub-section, the state of the mind of the assessee becomes relevant. In the instant case, we find that the assessee acted on the advice of Chartered Accountant. As to the working of deduction under Section 80-HHC, there existed a cleavage of judicial opinion, at the relevant point of time. There was no decision of the binding nature available on the point, when the return was filed. There is absolutely nothing on record to doubt the bonafide of the claim. The factum of concealment ought to be established beyond the shadow of doubt.

6. We have perused the reasonings given by the commissioner of income-tax (Appeals). In our opinion, he took a correct view in the matter. In the facts and circumstances of the present case, the assessee may be exonerated from the rigour of penalty. We direct accordingly. EX CONSEQUENTI we uphold the impugned order.

7. In the result, appeal of the Revenue, stands dismissed.

8. In view of the aforesaid, it is apparently clear that the petitioners M/s. Hindustan Carbide Ltd. have never tried to conceal the income by filing initial income tax return. Hence, their case is

not covered under Section 278E of the Income Tax Act. Accordingly, their petition is allowed and the impugned order passed by the ACMM is set aside. The bail bond of the petitioner stands discharged.

9. Now coming to the facts of the case of M/s Allena Auto Industries Pvt. Ltd., in the impugned order the trial Court has dismissed the application filed under Section 245(2) of the Cr.P.C. by making the following observations:

1. xxxxxxx. The documents furnished by accused company showed accused company had debited a sum of Rs.3,14,645/- on account of warranty claims and warranty claims had been claimed for earlier years also. On 1st of July, 1988, the company had an opening balance of Rs.3,30,043/- and past experience showed that actual claims of the dealers in any year exceeded Rs. 2 lacs but despite that company made further provision of Rs.2,66,597/- but actual claims of Rs.1,07,600/- only. The net result being that there was a balance of Rs.4,89,039/- as on 31.3.1987 and accused company should have surrendered this amount for taxation but instead attempt was made to evade tax.

2. In the application in hand the accused have taken the stand that since claims from customers may well be received after two or three years, an amount equivalent to 2% of the sales was provided for, based on company's experience. Further, the stand taken is that such provisions were made by accused company for previous year and the only point of dispute was not the claim of warranty but quantum thereof. It has also been stated that assessee itself disclosed these particulars in various documents and there was no concealment, proceedings are not maintainable in law. Penalty imposed upon assessee has been cancelled by CIT (A).

3. Arguments were heard on behalf of both the parties. Had the dispute been restricted to provisions for claim, then the position taken by assessee would have been correct but despite providing 2% of Sales for claims, opening balance from the previous year which was 3,30,043/- further provision of Rs.2,66,597 was made though claims never exceeded Rs. 2 lacs and actual claims for the relevant period were only Rs.1,07,600/-, thus, an amount of Rs.4,89,039/- was withheld by the assessee company and hence I hold that there are sufficient grounds against the accused for the allegations and application filed by the accused is dismissed.

10. Now coming to the observations made in this order which are

relevant for the purpose of deciding the real issue before this Court are reproduced hereunder:

If any of the two conditions is not fulfilled penalty u/s 271(1)(c) could not be sustained. In the instant case certainly the appellant has failed to substantiate its explanation. It has resulted into addition and upholding of the addition by the ITAT. Thus, point to be adjudicated was whether the claim of the appellant was bonafide or not. Because once the claim of the appellant is bonafide the penalty u/s 271(1)(c) is not imposable in view of explanation (1) to Section 271(1)(c). It is in this connection that I have verified the facts in the earlier years. I find that since its inception the appellant has made the provision for warranty and debited the same in its books of accounts. Thus, it is clear that the appellant has maintained a particular system of accounting constantly I find that in the assessment year 82-83, 83-84 and 84-85 the addition made by the AO was deleted by the CIT (A). If the explanation of the appellant finds favour with the CIT (A) it is enough evidence that the claim of the appellant was bonafide. It is noteworthy that though in the assessment year 84-85 and 85-86 the appellant got relief from the CIT (A), the department did not prefer any appeal against such deletion. In the assessment years 1986-87 to 88-89 the appellant claimed deduction on provision basis and the same was allowed by the AO vide his orders under Section 143(1) of the Act. Such order has not been challenged either by way of issue of notice under Section 148 or u/s 263 of the Act. The conduct on the part of the department also proves that the claim of the appellant was bonafide. From the assessment year 90-91 the appellant itself has become aware with the provision and claimed deduction on the basis of actuals. But there is force in the arguments of the learned counsel that the warranty period is to run from the date the tractors are sold to various customers. In between the sale of goods by the appellant and the actual sale of tractors to the consumers a long period of more than 2 years elapses. Thus the actual claim received in a particular year will not give the correct picture as to such claim was relatable to the sales made two years or 3 years earlier. All these facts clear show that the appellants claim was bonafide. It is not the case of the department that the claim of the appellant was bogus or the liability of the appellant was bogus. The department accepts that the appellant is liable to make good loss/defects by replacement/repairs. The only dispute is that the department feels that the deduction should be allowed on the actual basis whereas the appellants claim is that the same was allowable on provision basis. After litigation up to the Tribunal Stage the appellant itself changed its method in the assessment year 90-91 wherein the liability has been claimed on actual basis. All these facts will clear indicate that though the claim of the appellant could not be substantiated certainly such claim was bonafide. Thus, in view of Explanation (1) to Section 271(1)(c) the penalty u/s 271(1)(c) was not imposable.

9. I further notice that it is well settled law that the addition to the total income does not automatically gives

rise to the penalty u/s 271(1)(c). The assessment proceedings and the penalty proceedings are two independent proceedings and even if certain addition has been made/confirmed by the appellant authority, it will not automatically lead to conclusion that there is concealment of income or furnishing of inaccurate particulars of income. Hon'ble Supreme Court in the case of Shadilal Sugars (supra) has held the same view. The Hon'ble Supreme Court in the case had observed that there may be 101 reasons for agreeing the income to be taxed but it does not mean that such income was concealed income attracting the penalty u/s 271(1)(c). Respectfully following this decision I hold that it is not a fit case for imposition of penalty u/s 271(1)(c) of the act. Accordingly the penalty imposed by AO is not justified and the same is cancelled.

In the result the appeal is allowed.

11. In this case, I am satisfied that the provisions made by the petitioners for warranty claims instead of the actual claim on the basis of past precedent reflects their intention to save the income. Merely because the penalty imposed upon them has not been retained by the order issued by the Income Tax Appellate Authority, the question of their bonafide in claiming higher claims for warranty on account of the warranty claims needs to be established by them before the Court of ACMM during the course of trial in accordance with the provisions contained under Section 278E of the Act. Thus, I find that the order passed by the ACMM in their case does not suffer from any infirmity and their petition as presented before this Court cannot be allowed. Reference can also be made to judgments delivered by this Court in the case of N.K. Jain Vs. Union of India & Ors. ITR Vol.254 388 where this Court held as under:

The law with regard to quashing of the criminal proceedings arising out of FIR and criminal complaint is well-settled. Quashing is permissible in terms of the principle laid down in State of Haryana Vs. Bhajan Lal, AIR 1992 SC 604, and several subsequent judgments. Evidence at this stage cannot be appreciated. Section 278E of the Act provides that for prosecution of the offence under the Act which requires a culpable state of mind on the part of the accused, the court shall presume

the existence of such mental state, it reads:

“278E. Presumption as to culpable mental state.-(1) in any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation,-In this sub-section, ‘culpable mental state’ includes intention, motive or knowledge of a fact, or belief in, or reasons to believe, a fact.

(2) for the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.”

The rule of evidence thus stands changed by the above section. In the prosecution for an offence under the Act, it is for the accused to prove his defence, which he can do by cross-examining the prosecution witnesses or by leading defence evidence.

I have been taken through the allegations made in the complaint and the supporting documents. At this stage, taking the allegations made in the complaint on their face value and accepting the same in entirety, it cannot be said that, prima facie, the offence alleged is not made out against the petitioners. The detailed examination of the allegations and the documents is being avoided as the trial is yet to commence.

For the foregoing reasons, I find no merit in the petition and the same is dismissed.

12. Similarly, Justice R.S. Sodhi in the case of M/s Bandhu Machinery Pvt. Ltd. Vs. Addl. Chief Metropolitan Magistrate, Crl.Rev.630/2001 decided on 13.02.2002 held as under:

“Having heard learned counsel for the parties and in the facts and circumstances of the case, where the addition of Rs.80,000/- has become final vide an order of the Tribunal dated 20th July, 1992. The adjudication in the penalty proceedings cannot be binding on the Criminal Court. It must arrive at its own decision on an independent evaluation of evidence adduced before it and the assessee will have all opportunity under Section 278E of the Income Tax Act to dispel the presumption. In this view of the matter, I find no infirmity in the order under challenge.”

13. Accordingly, while the petition filed by M/s Hindustan Carbide Pvt. Ltd. (Crl.M.C.2856/2001) is allowed, the petition filed by M/s

Allena Auto Industries (P) Ltd. (Crl.M.C.1898/2001) is dismissed. Consequently, the complaint filed against M/s Hindustan Carbide Pvt. Ltd. stands quashed and their bail bonds stand discharged.

14. The proceedings pending before the ACMM against M/s Allena Auto Industries (P) Ltd. will continue and for that purpose parties concerned to appear before the ACMM on 17.07.2009.

MOOL CHAND GARG, J.

JULY 02, 2009
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