

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

% Judgment delivered on: 10.10.2011

+ ITA No. 626/2011

CIT-LARGE TAX PAYERS UNIT, NEW DELHI APPELLANT

Vs

M/S MAHANAGAR TELEPHONE NIGAM LTD.,
NEW DELHI RESPONDENT

Advocates who appeared in this case:

For the Appellant: Mr N.P. Sahni, Advocate
For the Respondent: Mr A.K. Chhabra, Advocate

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL
HON'BLE MR JUSTICE RAJIV SHAKDHER

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

RAJIV SHAKDHER, J

1. This is an appeal preferred by the revenue against the judgment of the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') dated 06.07.2010. The only issue which arose for consideration before the authorities below was with regard to tenability of the order passed by the Assessing Officer (hereinafter referred to as 'A.O.') in levying a penalty in the sum of Rs 21,34,200/- on the assessee under the provisions of Section 271(1)(c) of the Income Tax Act, 1961 (in short 'I.T. Act'). The

penalty was imposed by the revenue on account of the following:-

(i) disallowance of the claim made by the assessee in respect of contributions made to the Bombay Telephone District Staff Welfare Fund (hereinafter referred to as 'Fund'); a fund which is undeniably created for the welfare of its employees. A deduction in this regard was claimed by the assessee under Section 40A(9) of the I.T. Act in respect of contribution amounting to Rs 15,50,000/-. The revenue, however, disallowed the deduction.

(ii) The assessee claimed depreciation on vehicles used in rendering services to its customers at the rate of 25%, whereas the A.O allowed the depreciation at the rate of 20% in accordance with rates stipulated in appendix (1) Rule 32 of the Income Tax Rules, 1962 (in short 'I.T. Rules'). The difference in the admissible claim which arose thereby, was added to the income of the assessee; being a sum of Rs 45,47,712/-.

2. It is on account of the aforesaid disallowance under Section 40A(9) of the I.T. Act and the addition of excess depreciation that the A.O. initiated penalty proceedings under Section 271(1)(c) of the I.T. Act.

3. With this prefatory note, the facts which are required to be noticed in order to adjudicate upon the appeal are as follows:

3.1 The assessee, which is a public sector undertaking, had filed its return of income for assessment year 1998-99, on 30.1.1998. In

the said return the assessee had declared its total income in the sum of Rs 1470,78,65,932/-.

3.2 The assessment proceedings under Section 143(3) of the I.T. Act were completed on 15.01.2001 whereat the income of the assessee was pegged at Rs 1798,82,07,340/-. The said income was, however, reduced to a sum of Rs 1795,81,28,344/- vide order dated 31.10.2003, passed under Section 250(6) of the I.T. Act.

3.3 The assessee was, however, issued a notice under Section 148 of the I.T. Act to re-open its assessment. Consequent thereto, re-assessment proceedings were completed under Section 147 read with Section 143(3) of the I.T. Act. This resulted in the income being assessed at Rs 1796,42,26,056/-. The enhancement in the income was on account of the aforementioned additions made to it, with regard to contributions made to the Fund, on the ground that they were inadmissible under Section 40A(9) of the I.T. Act, and that which pertained to the erroneously claimed rate of depreciation by the assessee.

3.4 The A.O. in the aforesaid proceedings initiated penalty proceedings under Section 271(1)(c) of the I.T. Act. A show cause notice was served on the assessee, and after giving due opportunity, the A.O. levied the penalty under Section 271(1)(c) of the I.T. Act. The rationale supplied by the A.O. for levying penalty is that the assessee had furnished “***inaccurate particulars***”.

4. The assessee being aggrieved preferred an appeal with the Commissioner of Income Tax (Appeals) [hereinafter referred to as "CIT(A)"]. The CIT(A), however, agreed with the stand of the assessee, and consequently deleted the penalty levied by the A.O.

5. This resulted in the revenue preferring an appeal with the Tribunal. As noticed above, the Tribunal vide the impugned judgment has rejected the appeal of the revenue. It is because of this fact that the revenue has come up in appeal before this court.

6. Mr Sahni, who appears for the revenue has submitted that the judgment of the Tribunal deserves to be reversed as the Tribunal ignored the fact that the auditors of the assessee had categorically observed in their statutory report (submitted in Form 3CD) in clause 6(f) that contributions made to the Fund could not be claimed as deduction under Section 40A(9) of the I.T. Act.

6.1 Mr Sahni submitted that despite such an observation made in clause 6(f) of the statutory report, the assessee did not seek to revise its return and, therefore, had submitted inaccurate particulars in terms of provisions of Section 271(1)(c) of the I.T. Act.

6.2 As regards the addition of excess depreciation claimed by the assessee, Mr Sahni argued that the assessee have been filing returns for a number of years, and had, in the form of able assistance, an array of qualified accountants to maintain their accounts – and, therefore, could not claim ignorance with regard to

the provisions of law vis-à-vis the rate of depreciation on vehicles. It was thus contended that given these circumstances the excess depreciation claimed by the assessee would also fall within the ambit of expression “furnishing of inaccurate particulars” within the meaning of Provision of Section 271(1)(c) of the I.T. Act. For these reasons, Mr Sahni submitted that the judgment of the Tribunal was perverse and hence ought to be reversed.

6.3 Mr Sahni also contended that after the insertion of explanation (1) to Section 271(1)(c) of the I.T. Act the onus was on the assessee to establish that there was no mens rea in furnishing inaccurate particulars.

6.4 It was submitted that in view of the judgment of the Supreme Court in the case of ***UOI vs Dharmendra Textile Processors 2008 (306) ITR 277(SC)***, it is now beyond doubt that imposition of penalty involved civil liability and there was therefore, no obligation in law to establish mens rea. In addition to the aforesaid judgment, Mr Sahni also relied upon the following judgments:

Commissioner of Income Tax vs Atul Mohan Bindal (2009) 317 ITR 1 (SC); CIT vs zoom communication Pvt. Ltd. (2010) 327 ITR 510 (Del) and CIT vs Shri Rakesh Suri (2011) 331 ITR 458 (All).

7. As against this Mr Chhabra largely relied upon the judgment of the Tribunal. He submitted that it is now well settled that penalty could not be levied on an assessee merely because a deduction

claimed had been disallowed by the revenue. It was contended that a wrong claim by itself would not automatically entail levy of penalty. The learned counsel, in support of his submissions, relied upon the following judgments:

CIT vs Mahavir Irrigation (P) Ltd. (2011)VIAD(Del)702; CIT vs IFC Ltd. (2011) 199 TAXMAN 21(Del) and CIT vs M.S. Bindra & Sons (P) Ltd. (2011) 336 ITR 125 (Del).

8. We have heard the learned counsel for the parties and also perused the judgment and the orders of the authorities below. A perusal of the order of the A.O. would show that there is a reference to the proceedings initiated under Section 147 and 148 of the I.T. Act. It is pertinent to note that the re-opening of assessment, that is, the issuance of notice under Section 148 of the I.T. Act was sustained. While passing the assessment order under Sections 147 and 143(3) of the I.T. Act, the A.O. noted the explanation offered by the assessee in the form of response to the show cause notice issued in respect of those proceedings. The explanation offered by the assessee was as follows:

“.....It is submitted that the assessee has paid a sum of Rs 15,50,000/- towards contribution to Bombay Telephone District Staff Welfare Fund. The same has been spent incurred by the company for the benefits of its employees and has been incurred wholly & exclusively for the purpose of the business. However, the auditor of the company in his audit report has remarked that the sum paid by the assessee as an employer towards contribution

of Bombay Telephone District Welfare Fund is not allowable under Section 40A(9) of the IT Act. It may be mentioned here that mere remark of the auditor of the company does not amount to the applicability of the provisions of Section 148. The AO should also use own analytical method, skills in order to determine the applicability of such provisions.

It may be further mentioned here that the said expenditure has been issued wholly and exclusively for the purpose of business of the assessee company and for the benefit of its employer.

Further, it may be stated here that the company has incurred the said amount in accordance with the rule of the firms (sic fund). In case of Western India Paper & Board vs CIT (1982) 137 ITR525 (Bom), it was held by the Hon'ble Court that for admissibility of a contribution towards a recognized provident fund as permissible deduction, a contribution must have been made in accordance with the rules of that fund.

In respect of the issue of depreciation, it is submitted that in order to carry out its main object, the company has to carry its own fleet of vehicle so as to cater the needs of its customers, employees, etc. promptly. Being extensive used for carrying the service/object of the company the same were considered part of plant and machinery and accordingly depreciation was claimed @ 25% instead of 20% as applicable to vehicle. Moreover the same have been allowed @ 25% p.a. for the earlier assessment years by the Assessing Officer while framing the assessment. (emphasis is ours)

9. It would be pertinent to note that explanation with respect to

both the disallowance under Section 40A(9) of the I.T. Act as well as claim for higher rate of depreciation was rejected by the A.O. In respect of the disallowance under Section 40A(9) of the I.T. Act, the A.O. took the view that only those contributions were eligible for deduction under the said section, which were made towards recognized provident fund or approved superannuation fund or even an approved gratuity fund. Such not being the case, the deduction claimed was not allowable.

9.1 As regards the depreciation, the A.O. came to the conclusion that depreciation could not be claimed under the I.T. Act on the basis of the use to which the asset has been put to. Since the assessee had failed to furnish the nature and detail of the vehicles on which the depreciation was claimed at the rate of 25%, he could not have sustained its stand that the vehicles formed part of assessee's plant and machinery. Consequently, depreciation was allowed only at the lower rate of 20%. The excess depreciation was added to the income of the assessee. These observations formed part of the order dated 24.03.2005, passed in the re-assessment proceedings. It is by this order that the A.O. initiated penalty proceedings against the assessee under Section 271(1)(c) of the I.T. Act for what he construed as "***filing inaccurate particulars of income***".

10. In the order passed under Section 271(1)(c) the A.O., disagreed with the stand of the assessee that there was no malafide

on the part of the assessee in making contributions to the fund inasmuch as fund was set up by the Department of Telecommunication, Government of India even before the incorporation of the assessee, i.e., MTNL.

10.1 In support of this stand, it was sought to be brought to the notice of the A.O., that the fund was created to give financial assistance to the dependents of the deceased members of the fund or their children, as also, those members who were handicapped. There was, according to the assessee, provision for grant of scholarship for technical and non-technical purposes to handicapped and differently abled children of the members of the fund. The fund, also had provision for granting financial assistance for running crèches, holiday homes, recreational clubs and grant of books etc. to meritorious children of the members of the fund. Attention was also drawn to the provisions of Section 40A(10) of the I.T. Act. In the alternative the assessee had also referred to the provisions of Section 37(1) of the I.T. Act; the expenditure having been incurred wholly and exclusively for the purposes of the business of the assessee, and being otherwise in the nature of a revenue expenditure, which did not fall under the provisions of Section 32 to 36 of the I.T. Act.

10.2 It was contended before the A.O. that a complete disclosure have been made by the assessee in its return of income and the

documents/ reports filed in support of such return of income. It was contended that merely because the A.O. disallowed the claim on the basis of a different view held by the auditor, as expressed in his tax audit report, it would not amount to either “**concealment**” of income or “**furnishing of inaccurate particulars**” of the income, by the assessee.

10.3 Similarly, with respect to addition on account of depreciation on vehicles, the assessee took the stand that it was required to carry its own fleet of vehicles to cater to the needs of its customers. Since the said vehicles were used to further its objects, the assessee was of the opinion that they were really in the nature of plant and machinery, and thus were amenable to a claim for depreciation at the higher rate of 25% as against 20% specified for vehicles generally under the I.T. Act. Notably, it was also submitted that in the earlier assessment years the A.O. had allowed depreciation at the rate of 25%. It was thus contended that these claims had again been reflected in the return of income filed by assessee and in the documents furnished alongwith, in the form of financial statements, annexures appended therewith and the audit report. The assessee, thus took the stand that, therefore, there was no malafide intention on its part which could result in attracting penalty provisions to it.

11. The A.O., however, after noticing the stand taken by the assessee perfunctorily rejected the explanation. On a careful

perusal of the order, we have been unable to locate any finding of the A.O. with regard to the assessee having furnished inaccurate particulars. There is a vague reference to the fact that inaccuracies in the books of accounts which result in “keeping off” or “hiding” a portion of the income could be construed as furnishing inaccurate particulars; is not followed up by saying that, in this particular case, he had come to a conclusion that such a circumstance existed. As a matter of fact there is no discussion with respect to the explanation given by the assessee. The A.O. has simply observed that w.e.f. 01.04.1976, pursuant to the amendment made to the provisions pertaining to penalty, the onus for establishing mens rea has shifted on to the assessee. The order of the A.O., in our view, is without a finding on both aspects; that is, the assessee furnished inaccurate particulars, and that, the explanation given by the assessee was not bonafide. It is perhaps because of this reason that the CIT(A) in his order reversed the view taken by the A.O. The CIT(A) after referring to a number of judgments on the issue made the following observations in paragraph 4.4 and 4.5 of its order which for the sake of convenience are extracted hereinbelow:

“.....In the instant case. The disallowances on account of (a) depreciation on vehicles amounting to Rs.45,47,712/- and (b) the claim of Rs. 15,50,000/- being payment made towards Bombay Telephone District Staff Welfare Funds in terms of section 40A (9) of the act does not lead to the inference that the

assessee has concealed its particulars of income or furnished inaccurate particulars relating to the impugned addition were furnished before the Assessing Officer, Hon'ble Punjab High Court in the case of CIT Vs. Ajaib Singh & Co. (2002) ITR 630 have observed that merely because of certain expenses claimed by the assessee are disallowed by an authority, it cannot mean that particulars furnished by the assessee were wrong. It was held that mere disallowance of expenses per se cannot mean that assessee has furnished inaccurate particulars of its income.....

....From the decision cited above, it can be concluded that mere disallowance or addition will not be sufficient for levy of penalty u/s 271 (1) (c). The issue under reference is squarely covered by the above decision. Though it may be argued that not filing correct return of income is equal to filing incorrect return of income and therefore the assessee can be said to be guilty of filing inaccurate particulars of income but for levy of penalty u/s 271 (1) (c) this status is not sufficient. The A.O. has to show by some positive material with which he can compare that what was filed by the assessee was inaccurate or was false leading to the inference that the assessee has concealed income or filed inaccurate particulars of income. Mere disallowance or not accepting the claim of the assessee will not be sufficient in view of the above and taking into consideration the facts (a) that the appellant had disclosed all material facts and (b)

on the claim of appellant two opinions are possible, I hold that there is no case of concealment or furnishing of inaccurate particulars of its income in respect of the disallowance on account of (i) depreciation on vehicles amounting to Rs.45,47,712/- and (ii) contribution to Bombay Telephone District Staff Welfare Fund to the extent of Rs.15,50,000/-, totaling Rs.60,97,712/-. Therefore, it is held that A.O. was not justified in levying penalty u/s 271 (1) (c) in respect of the said disallowances. Accordingly, the same is cancelled..” (emphasis is ours)

12. The Tribunal in appeal preferred by the revenue affirmed the stand of the assessee. As noted by us, the Tribunal also observed that the A.O. had returned no finding that the assessee had furnished inaccurate particulars. The relevant observation in that regard for the sake of convenience is extracted hereinbelow:-

“....In assessee’s case, the addition was made on account of depreciation on vehicle and contribution the Bombay Telephone District Staff Welfare Fund. There is no finding by the Assessing Officer that the assessee had furnished inaccurate particulars. At the most it can be said that assessee made a bonafide claim, which was not sustainable. It cannot be said that assessee made a false and erroneous claim, which could amount as filing inaccurate particulars of income. No penalty can be levied on making bonafide claim. In the case of Reliance Petroproducts Pvt.Ltd.(supra), the Hon’ble Supreme Court has also

considered the case laws relied upon by the revenue (cited supra). Hon'ble Supreme Court had also held that no penalty u/s 271 (1) (c) can be invited for mere making a claim which is not sustainable in law by itself in view of this, we confirm the order of the CIT (Appeals) for deleting the levy of penalty u/s 271 (1) (c)...." (emphasis is ours)

13. Therefore, according to us, it is quite clear, in this particular case, that the A.O. having failed to record a finding that the assessee had furnished inaccurate particulars, the imposition of penalty under Section 271(1)(c) of the I.T. Act was a complete non-starter. This finding of fact has been affirmed by the Tribunal and we find no reason to disagree with the same. A mere erroneous claim made by an assessee, though under a bonafide belief that, it was a claim which was maintainable in law, cannot with more, lead to an imposition of penalty. In the instant case it is quite evident that both claims were made under the belief that they were maintainable in law. In regard to contributions made to the funds, the assessee genuinely differed with the statutory auditor. Similarly, with regard to claim of higher rate of depreciation on vehicles, it was based on the premise that the vehicles used by the assessee were in the nature of plant and machinery as these were the vehicles which were used to correct faults and to provide other services to its customers. The denial by the A.O. of these claims would not, in our view, lead to the conclusion that the assessee had furnished

inaccurate particulars. There is no dispute that the information with respect to both the claims was provided in the returns filed by the assessee and the documents appended thereto. There is no ground in the appeal impugning this fact. The argument advanced before us by Mr Sahni that the findings of the Tribunal were perverse does not find a reflection in the averments made in the appeal. In our view the observations made by the Tribunal are pure findings of fact and no substantial question of law arises for our consideration. If a re-affirmation is required to be found in what has been observed by us hereinabove, the following principle enunciated in the judgment of the Supreme court in the case of **CIT vs Reliance Petroproducts Private Limited (2010) 322 ITR 158(SC)** would suffice:

"271(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person- (c) has concealed the particulars of his income or furnished inaccurate particulars of such income."

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 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 the 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. 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 concerned words. 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 Commissioner of Income Tax, Delhi Vs. Atul Mohan Bindal [2009(9) SCC 589 2009 Indlaw SC 1034], 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 Vs. Dharamendra Textile Processors [2008(13) SCC 369 2008 Indlaw SC 1837], as also, the decision in Union of India Vs. Rajasthan Spg. & Wvg. Mills [2009(13) SCC 448 2009 Indlaw SC 635] and

reiterated in para 13 that:-

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

8. Therefore, it is obvious that it must be shown that the conditions under Section 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the Return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. In Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. [2007(6) SCC 329 2007 Indlaw SC 896], this Court explained the terms "concealment of income" and "furnishing inaccurate particulars". The Court went on to hold therein that in order to attract the penalty under Section 271(1)(c), mens rea was necessary, as according to the Court, the word "inaccurate" signified a deliberate act or omission on behalf of the assessee. It went on to hold that Clause (iii) of Section 271(1) provided for a discretionary jurisdiction upon the Assessing Authority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term "inaccurate particulars" was not defined anywhere in the Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars. It was further held that the assessee must be found to have failed to prove that his explanation is not only not bona fide but all the

facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The Court ultimately went on to hold that the element of mens rea was essential. It was only on the point of mens rea that the judgment in Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. 2007 Indlaw SC 896 was upset. In Union of India Vs. Dharamendra Textile Processors 2008 Indlaw SC 1837 (cited supra), after quoting from Section 271 extensively and also considering Section 271(1)(c), the Court came to the conclusion that since Section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing Return, there was no necessity of mens rea. The Court went on to hold that the objective behind enactment of Section 271(1)(c) read with Explanations indicated with the said Section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, willful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under Section 276-C of the Act. The basic reason why decision in Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. 2007 Indlaw SC 896 (cited supra) was overruled by this Court in Union of India Vs. Dharamendra Textile Processors 2008 Indlaw SC 1837 (cited supra), was that according to this Court the effect and difference between Section 271(1)(c) and Section 276-C of the Act was lost sight of in case of Dilip

N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. 2007 Indlaw SC 896 (cited supra). However, it must be pointed out that in Union of India Vs. Dharamendra Textile Processors 2008 Indlaw SC 1837 (cited supra), no fault was found with the reasoning in the decision in Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. 2007 Indlaw SC 896 (cited supra), where the Court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. 2007 Indlaw SC 896 (cited supra) to the effect that mens rea was an essential ingredient for the penalty under Section 271(1)(c) that the decision in Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai & Anr. 2007 Indlaw SC 896 (cited supra) was overruled.

9. We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate" has been defined as:-

"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript". We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here 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. Such not

being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to the inaccurate particulars.

(emphasis is ours)

14. We may also note that the judgment of the Supreme Court in **Dharmendra Textile** (*supra*) has been explained in **UOI vs Rajasthan Spinning & Weaving Mills (2009) 8 SCALE 231**. The following observations of Hon'ble Mr. Justice Aftab Alam, who was also party to the decision of the Supreme court in **Dharmendra Textile** (*supra*) makes that abundantly clear:

"....At this stage, we need to examine the recent decision of this court in Dharmendra Textile Processors (2008) 306 ITR 277. In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of nonpayment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile as we see no reason to understand or read that decision in that manner...."

15. It may also be important to bear in mind that both in the **Dharmendra Textile** (*supra*) and **Rajasthan Spinning** (*supra*) the court was considering the provisions of Section 11 AC of the Central

Excise Act, 1944. Since the provision was somewhat pari materia with the provisions of Section 271(1)(c) of the I.T. Act, there is a reference to those provisions in ***Dharmendra Textile*** (*supra*).

16. Be that as it may, it is quite clear on a reading of the observations made in ***Rajasthan Spinning*** (*Supra*) that, it is not as if, penalty would get attracted once the revenue seeks to make an addition. For penalty to get attracted, the conditions stipulated in the concerned provision are required to be fulfilled. In this case, as noticed above, the A.O. has returned no finding of fact that the assessee has filed an inaccurate return. In that view of the matter, in our opinion, no question of law, much less a substantial question of law, arises for our consideration. Findings returned by the CIT(A) and the Tribunal are pure findings of fact, which do not call for our interference. The appeal is, accordingly, dismissed.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

OCTOBER 10, 2011

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