

IN THE HIGH COURT OF JUDICATURE AT PATNA

Tax Cases No.28 of 1998

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M/S Ashirbad Enterprises, Exhibition Road Patna			Petitioner
Versus			
The Commissioner of Income Tax, Patna Region, Patna			Respondent
with			

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Tax Cases No. 29 of 1998

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M/S Ashirbad Enterprises, Exhibition Road, Patna			Petitioner
Versus			
The Commissioner of Income Tax, Patna Region, Patna			Respondent

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Appearance :

For the Petitioner/s	:	Mr. D.V.Pathy, Advoate
For the Respondent/s	:	Mr. Archana Sinha, Sr. SC, IT
		Mr. Suman Kumar, Mishra, Jr. SC

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

Date: 15-12-2016

Heard learned counsel for the petitioner-Assessee

and learned Senior Standing Counsel for the Income Tax

Department.

Both the references have been made at the

instance of the assessee arising out of two appeals filed by the

assessee, namely, ITA Nos. 8 & 44/Pat/1992 for the assessment

years 1981-82 and 1983-84. The Tribunal has referred the

following question of law for the opinion of this Court:-

“Whether on the facts and in the circumstances

of the case the Tribunal was correct in law in



upholding the levy of penalty under Section 271(1) (c) of the I.T. Act for the A.Ys. 1981-82 and 1983-84?”

The facts may be briefly noted. A search was conducted on the premises of the assessee under Section 132 of the I.T. Act during the course of which loose sheets were discovered containing details of cash creditors of all the three concerns of Poddar Group. Also a few signed receipts from the creditors were attached to the list which were blank and undated.

On 14.4.1981 the assessee filed a settlement application before the Settlement Commission claiming that the loans in question had been taken during the period relevant to the assessment years 1977-78 to 1980-81. The matter was ultimately disposed of by the Settlement Commission on 18.4.1995. The assessee did not initially surrender the said cash credit at the time of filing the application before the Settlement Commission but ultimately in the course of hearing of the settlement application, the cash credits were shown as its own income and accordingly, immunity was granted by the Settlement Commission with respect to the same under Section 245H of the Act.

With respect to the assessment years in question, i.e., 1981-82 and 1983-84, which were not the matter before the



Settlement Commission, the assessee filed his return on 30.9.1981 and 2.8.1983 and assessment orders with respect to them were passed on 21.3.1984 and 31.3.1986 respectively.

In the course of assessment proceeding the Assessing Officer came to the conclusion that the assessee has not been able to give satisfactory explanation as to how all the receipts were in its possession when the alleged loans were still unpaid and accordingly he concluded that the assessee had obtained those receipts in order to safeguard himself from possible blackmail by them. It was accordingly held that the loans were nothing but assessee's own money which had been introduced in the books as loan and they were wholly bogus. The interest claimed on the said loans for the two assessment years in question were therefore disallowed and they were added back to the income for the said years. For the assessment year 1981-82 an amount of Rs. 56,265/- was disallowed and for the assessment year 1983-84 Rs. 49,693/- was disallowed. There was also an addition of cash credit of Rs. 10,000/- given to M/s. L.N.Poddar & Sons (HUF).

In the above appeals against the assessment orders ultimately the ITAT confirmed disallowance with the clarification that the assessee would be at liberty to get the orders rectified after the disputes had been decided by the Settlement



Commission in respect of assessment years 1977-78 to 1980-81.

In the penalty proceedings initiated under Section 271(1)(c) of the Act, the Assessing Officer held the assessee guilty of concealment of income by claiming false deductions of interest on bogus cash credit in the two assessment years and also on account of bogus cash credit of Rs. 10,000/- in the name of M/s. L.N.Poddar & Sons (HUF) in the assessment year 1983-84 and penalties were accordingly imposed. On appeal the Deputy Commissioner of Income Tax (Appeals) had confirmed the penalties. The further appeal filed by the assessee before the ITAT was dismissed confirming the penalty.

Learned counsel for the petitioner submits that the Tribunal has erred in confirming the penalty on the ground that even after the filing of the settlement application the intention of the assessee were not honest and that the assessee had surrendered the cash credit as income in the course of hearing of the settlement application when he would have found that the goings were not favourable to it before the Commission. It is further submitted that the Tribunal was wrong and has erroneously concluded that since the returns for the 2 assessment years 1981-82 and 1983-84 were filed on 30.9.1981 and 2.8.1983 respectively, after the filing of the settlement application on 14.4.1981, the benefit is not available to



the petitioner, without considering the fact that the hearing before the Settlement Commission had finally concluded on 18.4.1995 during the course of which the applicant surrendered the cash credit after lapse of about 14 years. It is submitted that the Tribunal has failed to consider that the surrender had been made by the petitioner only to buy peace with the department, in order to put to an end the protracted litigation. It is also submitted that the fact that the petitioner had surrendered the cash credit in settlement proceedings cannot be evidence in penalty proceedings which were conducted more than a decade earlier. It is urged that the assessment proceedings are separate from the penalty proceeding and the findings in the settlement proceedings are separate from penalty proceedings and what transpired during the settlement cannot be evidence in penalty proceedings.

In support of the aforesaid proposition learned counsel relies upon a decision of the Supreme Court in the case of **M/s. Anantharam Veerasinghaiah & Co. Vs. Commissioner of Income Tax, Andhra Pradesh**: (1980) 123 ITR 457 (SC) = AIR 1980 SC 2146, in para-6 of which (AIR) it has been held as follows:-

“6. Section 271 (1) (c) of the Income Tax Act, 1961 provides:-



"271 (1). If the Income Tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act is satisfied that any person-

(a) and (b)

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income he may direct that such person shall pay by way of penalty.-"

This is the provision as it stood at the relevant time. It is now settled law that an order imposing a penalty is the result of quasi-criminal proceedings and that the burden lies on the Revenue to establish that the disputed amount represents income and that the assessee has consciously concealed the particulars of his income or has deliberately furnished inaccurate particulars. Commissioner of Income Tax, West Bengal v. Anwar Ali (1970) 76 ITR 696 : (AIR 1970 SC 1782). It is for the Revenue to prove those ingredients before a penalty can be imposed. Since the burden of proof in a penalty proceeding varies from that involved in an assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted as a finding to that effect in the penalty proceeding. In the penalty proceeding the taxing authority is bound to consider the matter afresh on the material before it and, in the light of the burden to prove



resting on the Revenue, to ascertain whether a particular amount is revenue receipt. No doubt, the fact that the assessment order contains a finding that the disputed amount represents income constitutes good evidence in the penalty proceeding but the finding in the assessment proceeding cannot be regarded as conclusive for the purposes of the penalty proceeding. That is how the law has been understood by this Court in *Anwar Ali (supra)*, and we believe that to be the law still. It was also laid down that before a penalty can be imposed the entirety of the circumstances must be taken into account and must point to the conclusion that the disputed amount represents income and that the assessee has consciously concealed particulars of his income or deliberately furnished inaccurate particulars. The mere falsity of the explanation given by the assessee, it was observed, was insufficient without there being in addition cogent material or evidence from which the necessary conclusion attracting a penalty could be drawn. These principles were reiterated by this Court in *Commr. of Income-Tax, Madras v. Khoday Eswarsa and Sons, (1972) 83 ITR 369: (AIR 1972 SC 132).*”

The principal submission of learned counsel is that in the present matter there has been no concealment of the particulars of income or furnishing incorrect particulars of income by the assessee; rather it was only the claim for interest as expenditure which has been disallowed. It is submitted that mere



disallowance of expenditure cannot give rise to an order of penalty. In support of the same, learned counsel relies upon a decision of the Supreme Court in the case of Commissioner of Income Tax Vs. Reliance Petroproducts Private Limited.: (2010) 322 ITR 158(SC) in paras 8 and 9 of which the law has been succinctly laid down as follows:

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. The present is not a 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 CIT Vs. 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 Vs. Dharamendra Textile Processors (2008) 13 SCC 369 as also, the decision in Union of India Vs. Rajasthan Spg. & Wvg. Mills [2009] 13 SCC 448 and reiterated in paragraph 13 that: (page 13 of 317 ITR):

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

9. 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 CIT* (2007) 6 SCC 329, 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)(c) 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 Assessing Officer 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 CIT*



was upset. In Union of India Vs. Dharamendra Textile Processors, 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 the 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, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under section 276C of the Act. The basic reason why decision in Dilip N. Shroff Vs. Joint CIT was overruled by this court in Union of India Vs. Dharamendra Textile Processors, was that according to this court the effect and difference between section 271(1)(c) and section 276C of the Act was lost sight of in the case of Dilip N. Shroff Vs. Joint CIT. However, it must be pointed out that in Union of India Vs. Dharamendra Textile Processors, no fault was found with the reasoning in the decision in Dilip N. Shroff Vs. Joint CIT, where the court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in Dilip N. Shroff Vs. Joint CIT 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 CIT was



overruled.”

Learned counsel for the respondent, on the other hand, submits that the present case is clearly a case where the Assessing Officer has come to the conclusion that the loans claimed by the assessee were bogus and therefore the interest on such loans claimed in the two years were false claims raised by the assessee making it liable for penalty under Section 271 (1) (c) of the Act.

It is also submitted by learned counsel that the Tribunal has rightly held that the assessee's case before the Settlement Commission did not pertain to assessment years in question and thus it cannot escape the liability for penalty in the said years. In support of the said stand learned counsel relies upon a decision of the Supreme Court in the case of Union of India & ors.. Vs. Dharmendra Textiles Processors & Ors.: **(2008) 306 ITR 277 (SC)**, in paras 26 and 27 of which it has been held as follows:-

“26. It is of significance to note that the conceptual and contextual difference between section 271(1) (c) and section 276C of the Income-tax Act was lost sight of in Dilip N.Shroff's case (2007) 8 Scale 304 (SC)= (2007) 291 ITR 519 (SC).

27.The explanations appended to section 271(1)(c) of the Income-tax Ac entirely indicate



the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The judgment in Dilip N. Shroff's case (2007) 8 Scale 304 (SC) = (2007) 291 ITR 519 (SC) has not considered the effect and relevance of section 276C of the Income-tax Act. The object behind the enactment of section 271(1) (c) read with the Explanations indicates 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 276C of the Income-tax Act.”

Learned counsel also submits that the Tribunal is the final forum of fact and it is not open to the High Court to reach a conclusion on fact contrary to what has been decided by the Tribunal. In support of the said stand learned counsel relies upon a decision of the Supreme Court in the case of Commissioner of Income Tax Department Vs. D.L.F. United: (2000) 243 ITR 855, wherein at page 857 it has been held as follows:

“It is patent from the questions in the quantum appeal that they are questions of fact. The Income Tax Appellate Tribunal is the final fact-finding authority and it has decided against the assessee. The High Court ought not to have



entered into a discussion of the evidence to come to a conclusion on facts contrary to that reached by the Tribunal. That it had done so is clear from the judgment under appeal.”

We have considered the submissions of learned counsels for the parties. One important fact that stands out is that when the assessments were made on 21.3.1984 and 31.3.1986 respectively for the two assessment years, the status of the cash credit loan of the assessee was a matter pending before the Settlement Commission and thus no final view could have been taken about them in anticipation of what the Settlement Commission would decide even if the settlement application was for the assessment years 1977-78 to 1980-81 and did not comprise the assessment years in question before the Assessing Officer. The status of the cash credit thus could only have been decided with reference to the case in which the settlement application has been filed as it is the admitted position that the borrowings have been claimed in those earlier assessment years before the Settlement Commission and the only issue before the Assessing Officer thus pertains to interest on those borrowings. Moreover, as clearly held by the Apex Court in Anant Ram’s case (supra) that the penalty can be imposed only after taking into account the entirety of the circumstances which must point out to the conclusion that the



disputed loan relates to the income and that the assessee has concealed consciously the particulars of his income and deliberately furnished the incorrect particulars. It was further held that normally mere claim of the assessee was insufficient without there being in addition cogent material or evidence from which the necessary conclusion of imposing the penalty could be drawn.

It does appear from the materials on the record that no such attempt has been made to arrive at the finding; rather only on conjecture and surmises with regard to the assessee having surrendered the cash credit on his income in the course of hearing of the settlement application, he would have found that the goings were not favourable to it before the Settlement Commission. In our view it was not open to the Revenue or the Tribunal to have come to any such conclusion on the basis of mere conjecture and surmises as there can be many reasons for such surrender, including that put forward by the assessee that he wanted to avoid the protracted litigations.

Further, in our view the question of immunity granted under Section 245H by the Tribunal with regard to the said cash credit has not been considered in the proper light including the sequence of events. The fact that the assessee had not surrendered the said cash credit at the time of filing his application



on 14.4.1981 would be of no relevance as ultimately the surrender has been accepted by the Settlement Commission during the course of hearing which is not open to question in terms of the provisions of the Act. The fact that the surrender has been made by the assessee during the course of hearing in the year 1995 all the more ought to have been taken in favour of the assessee since the return had been filed much earlier on 30.9.1981 and 2.8.1983 on which date surrender of the cash credit could not be said to be in the contemplation of the assessee and accordingly he had claimed the interest as deduction for income in the two assessment years in question. Once the surrender of cash credit had been accepted by the Settlement Commission and the immunity granted then the claim of interest on the same as expenditure in the succeeding assessment years cannot straightaway give rise to penalty proceedings and normally would merely be a case of disallowance of interest. While the immunity with regard to the loan amount may not apply to the interest claimed thereon but the effect shall normally be to the extent of disallowance of the said interest as expenditure in the few succeeding assessment years, particularly when the claim had been made much before the final surrender of the said cash credit before the Settlement Commission.

Finally it has to be held that the present matter is



squarely covered by the decision of the Supreme Court in the case of Reliance Petroproducts Pvt. Ltd. (supra) wherein it was held that making an incorrect claim cannot tantamount to furnishing incorrect particulars and it has to be shown that there has been concealment of particulars of income and incorrect particulars have been furnished.

In this regard reliance by learned counsel for the revenue upon the decision of the Apex Court in Dharmendra Textiles (supra) is also of no avail in view of what has been explained by the Apex Court with regard to the said decision in para-9 of the judgment in Reliance Petro Products case (supra).

Thus on a consideration of the entire matters, this Court is of the view that the question of law referred by the Tribunal has to be answered in the negative in favour of the assessee and against the Revenue.

The reference is answered accordingly.

(Ramesh Kumar Datta, J)

I agree.

(Anjana Mishra, J)

S.Pandey/-

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