

**THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

I.T.T.A.No.134 OF 2016

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ORDER: *(Per Hon'ble Sri Justice M.Satyanarayana Murthy)*

With the consent of both Sri Avinash Desai, learned counsel for the appellant, and the learned Senior Standing Counsel for Income Tax, the appeal is heard at the stage of admission itself.

The assessee, under Section 260-A of Income Tax Act, 1961, preferred this appeal aggrieved by the order passed by the Income Tax Appellate Tribunal, Bench A, Hyderabad in I.T.A.No.1002/HYD/2015 dated 30.10.2015 for the assessment year 2002-2003.

The appellant/assessee is an individual and “***a Sales Tax Practitioner by profession***”. For the assessment year 2002-2003 he filed his return of income declaring the income from house property and profession.

A search and seizure under Section 132 of the Income Tax Act (hereinafter, for short, referred to as “the Act”) was conducted at Rajiv Gandhi International Airport, Hyderabad while the appellant/assessee was returning from Chennai and the authorities found that he was in possession of Rs.12,65,900/-, out of the said amount, an amount of Rs.12,00,000/- was seized. Thereafter, proceedings under Section 147 of the Act were initiated for the assessment year 2002-2003 and issued notice under Section 148 of the Act. In response to the notice under Section 148 of the Act, the appellant/assessee filed return of income declaring total income under Section 148 of the Act. During the course of post enquiry, on

the basis of statements obtained from various banks, in which the assessee held accounts, the financial statements were reconstructed. Taking the same as basis, as admitted in his statement under Section 132 (4) of the Act, the appellant/assessee declared further income of Rs.9,16,321/-. After verifying the facts, the Assessing Officer accepted the income declared by the appellant/assessee at Rs.12,15,580/-, initiated penalty proceedings under Section 271 (1) (c) of the Act for the assessment year 2002-2003 and levied penalty of Rs.2,80,394/- vide order dated 15.06.2010.

Aggrieved by the order of the Assessing Officer passed under Section 271 (1) (c) of the Act, the appellant/assessee preferred an appeal before the Commissioner of Income Tax (Appeals), Hyderabad and the Commissioner of Income Tax (Appeals) vide order dated 10.06.2015 dismissed the appeal filed by the appellant/assessee.

Aggrieved by the order passed by the Commissioner of Income Tax (Appeals), the appellant/assessee preferred an appeal before the Income Tax Appellate Tribunal, but no purpose was served as the Income Tax Appellate Tribunal by its order dated 30.10.2015 confirmed the order passed by the Assessing Officer and Commissioner of Income Tax (Appeals).

Aggrieved by the order of the Income Tax Appellate Tribunal the present appeal is preferred raising several contentions and one among them is that the Tribunal, Commissioner of Income Tax and Assessing Officer are not clear whether the appellant/assessee is guilty of “**furnishing of inaccurate particulars**” or “**concealment of particulars of income**” and that the appellant/assessee explained the reason for his failure to furnish the particulars; that he bonafidely believed that those particulars need not be furnished. In

the absence of any such finding, the penalty order cannot be sustained, in support of his contentions the appellant/assessee placed reliance on a judgment rendered in “**Commissioner of Income Tax v. Suresh Chandra Mittal**”^[1] and prayed to set aside the order passed by the Income Tax Appellate Tribunal.

Sri Avinash Desai, learned counsel for the appellant/assessee, would contend that the appellant bonafidely believe that he need not disclose the particulars and not guilty of concealment of any income, thereby his case would not fall within the ambit of Section 271 (1) (c) of the Act and placed reliance on a judgment of the Apex Court rendered in “Commissioner of Income Tax, v. Suresh Chandra Mittal”(referred supra).

On the strength of the judgment (referred supra) learned counsel for the appellant/assessee prayed to allow the appeal since non-disclosure of income is not intentional and prayed to set aside the order of the Tribunal and the penalty order passed by the Assessing Officer.

Whereas the learned Standing Counsel of the Income Tax Department supported the order under challenge in this appeal in all respects.

Considering rival contentions of both the counsel and on perusal of the material available on record, the point that arises for consideration is:

Whether the finding recorded by the Assessing Officer, confirmed by the Commissioner of Income Tax (Appeals) and Income Tax Appellate Tribunal is a finding of fact, if not, whether this Court while exercising power under Section 260-A of the Income Tax Act interfere with the order passed by the Assessing Authority, Commissioner of Income Tax (Appeals), confirmed by Income Tax Appellate Tribunal?

POINT:

It is the case of the petitioner that he did not disclose the income from various sources bonafidely, therefore, at best it would attract the provisions of Explanation:1 to Section 271 (1) (c) of the Act and thereby penalty cannot be levied for such non-disclosure of income.

Section 271 (1) (c) of the Act permits the Assessing Officer or Commissioner of Appeals or Commissioner in course of any proceedings under the Act, if satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars and when such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner of Appeals or Commissioner to be false, or such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is *bona fide* and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) be deemed to represent the income in respect of which particulars have been concealed and to initiate proceedings.

Explanation 3 to Section 271 (1) (c) of the Act says that where any person fails, without reasonable cause, to furnish within the period specified in sub-section (1) of Section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after 1st day of April, 1989, and until the expiry of the period aforesaid, no notice has been issued to him under clause (i) of sub-section (1) of Section 142 or section 148 and the Assessing Officer or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such

person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under Section 148.

Thus, it is clear from the Section 271 (1) (c) of the Act, failure to furnish income and failed to explain the reasons for the same, amounts to concealment of income within the explanation (3) of Section 271 (1) (c) of the Act.

In the present case, the appellant/assessee filed return disclosing income of Rs.2,99,263/- for the assessment year 2002-2003 under Section 139 (1) of the Act. His return was processed under Section 143 (1) of the Act. Since the assessee disclosed the income from house property and income from profession in the said return, search and seizure operations were conducted on 16.06.2008 at Rajiv Gandhi International Airport, Hyderabad while he was returning from Chennai to Hyderabad, found that he was in possession of Rs.12,65,000/-, out of the said amount Rs.12,00,000/- was seized. The search and seizure operation lead to the detection of 27 undisclosed bank accounts of assessee, in which there were deposits and withdrawals made at regular intervals. Even in the deposition under Section 132 (4) of the Act, he admitted that the deposits were out of the unaccounted sources of income. On the basis of the extracts of the said bank accounts, the assessee was asked to furnish cash flow statements. Accordingly, he filed necessary cash flow statements and the excess application of funds over the explainable sources came to an extent of Rs.90.47 lakhs as on 31.03.2008. For the assessment year 2002-2003, the unexplained cash balance came to an amount of Rs.9,16,321/-. Since the assessee's income is escaped

assessment, proceedings under Section 147 of the Act were initiated and notice under Section 148 of the Act was issued on 30.03.2009. Thereupon, the appellant/assessee filed return of income on 15.05.2009, but the Assessing Officer again issued another letter on 25.08.2009 calling for return. The appellant/assessee by his letter dated 02.09.2009 replied that he has already filed return of income admitting additional income of Rs.9,16,321/-. Thereupon, the Assessing Officer completed the assessment proceedings determining the total income at Rs.12,15,580/- as admitted in the return in response to notice under Section 148 of the Act while quantifying the undisclosed income as Rs.9,16,321/-. Thus, before the Assessing Officer the appellant did not file any objections raising specific plea that he did not disclose the income bonafidely and even before the Commissioner of Income Tax (Appeals) no such contention was raised for the reasons best known to him. Thereby, the question of recording any finding by the Assessing authority that the appellant/assessee bonafidely did not disclose the income from different sources in his return does not arise. Even before the Income Tax Appellate Tribunal, no such contention was raised enabling the Tribunal to record a finding that the appellant/assessee bonafidely did not disclose the income except contending that the confirmation of penalty under Section 271 (1) (c) of the Act is improper and arbitrary. Hence, in the absence of any such plea by the appellant/assessee, the authorities are not supposed to record any finding on that issue.

This Court while exercising power under Section 260-A of the Income Tax Act can admit the appeal if there is any substantial question of law.

To be 'substantial', a question of law must be debatable, not

previously settled by the law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. It will depend on the facts and circumstance of each case whether a question of law is a substantial one, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and the impelling necessity of avoiding prolonging the life of any lis.

Boodireddy Chandraiah v. Arigela Laxmi^[2] and **Santosh Hazari v. Purushottam Tiwari**^[3])

The Apex Court reiterated the same principle while deciding, what is substantial question of law? in “**Union of India v. Ibrahim Uddin**^[4]”.

In another judgment reported in “**Sudarshan Silks and Sarees v. Commissioner of Income Tax, Karnataka**^[5]” the Apex Court held that Income Tax Appellate Tribunal is the final Court of fact and its decision on facts can be gone into by the High Court only in reference jurisdiction if a question is referred to it stating that the finding arrived by the Income Tax Appellate Tribunal on facts was perverse in the sense that no reasonable person could have taken such a view, but this Court cannot go into the question of fact to reverse the finding of the Income Tax Appellate Tribunal.

In “**T.Ashok Pai v. Commissioner of Income Tax, Bangalore**^[6]” the Apex Court held that existence of mens rea is essentially a question of fact, the Tribunal alone, as the highest authority empowered to determine the question of fact, would be entitled to go thereinto and the High Court has no jurisdiction and it should not ordinarily disturb the finding of fact arrived at by the

Tribunal.

The burden of proof in a proceeding under Section 271 (1) (c) of the Act is always on the Revenue and when the Revenue discharges its burden, it is for the assessee to prove that there are bonafides in his failure to disclose the income from different sources. In “***Century Flour Mills Limited v. Commissioner of Income-Tax***^[7]”, the Apex Court held that if an explanation given by the assessee with regard to the mistake committed by him has been treated to be bona fide and it has been found as of fact that he had acted on the basis of wrong legal advice, the question of his failure to discharge his burden in terms of explanation appended to Section 271 (1) (c) of the Act would not arise.

The order imposing penalty is quasi-criminal in nature and, thus, burden lies on the department to establish that the assessee had concealed his income. Since burden of proof in penalty proceedings varies from that in the assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceeding constitute good evidence in the penalty proceeding. In the penalty proceedings, thus, the authorities must consider the matter afresh as the question has to be considered from a different angle.

The expression "conceal" is of great importance. According to Law Lexicon, the word "conceal" means:

to hide or keep secret. The word "conceal" is con plus clear which implies to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of. The offence of concealment is, thus, a direct attempt to hide an item of

income or a portion thereof from the knowledge of the income tax authorities.

In Webster's Dictionary, "inaccurate" has been defined as:

not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript.

It signifies a deliberate act of omission on the part of the assessee. Such deliberate act must be either for the purpose of concealment of income or furnishing of inaccurate particulars.

The term 'inaccurate particulars' is not defined. Furnishing of an assessment of value of the property may not by itself be furnishing of inaccurate particulars. Even if the explanations are taken recourse to, a finding has to be arrived at having regard Clause (a) of Explanation 1 that the Assessing Officer is required to arrive at a finding that the explanation offered by an assessee, in the event, he offers one was false. He must be found to have failed to prove that such explanation is not only not bona fide but all the facts relating to the same and material to the income were not disclosed by him. Thus, apart from his explanation being not bona fide, it should be found as of fact that he has not disclosed all the facts which was material to the computation of his income vide "Dilip N.Shroff v. Joint Commissioner of Income-Tax, Mumbai (arising out of SLP (C) No.26831/2004)."

In view of the judgment of the Apex Court, the explanation having regard to the decision of this Court must be preceded by a finding as to how and as to in what manner he furnished the particulars of his income. It is beyond any doubt or dispute that for the said purpose the Income Tax Officer must arrive at its satisfaction in this behalf.

It is now a well-settled principle of law that the more is the stringent law, more strict construction thereof would be necessary. Even when the burden is required to be discharged by an assessee, it would not be as heavy as the prosecution vide “***P.N. Krishna Lal and Ors. v. Govt. of Kerala and Anr***”^[8]. In view of law declared in perceptive pronouncements, consistently, by the Apex Court the initial onus is on revenue if explanation is offered by assessee. Once the onus is discharged, it would shift to assessee to prove bonafides, but the appellant/assessee failed to establish his bonafides in non-disclosure or concealment of the income.

The Income Tax Act was amended in 1976. Even after the amendment of 1976, the penalty proceedings, it is evident, continue to be penal proceedings. Similarly, the question whether the assessee has concealed the particulars of his income or has furnished inaccurate particulars of his income continues to remain a question of fact. Whether the Explanation has made a difference is while deciding the said question of fact the presumption created by it has to be applied, which has the effect of shifting the burden of proof. The entire material on record has to be considered keeping in mind the said presumption and a finding be recorded as held in “***Commissioner of Income Tax v. Jeevan Lal Sah***”^[9].

The appellant/assessee being the sales tax practitioner, who is conversant to the procedure of filing return under Sales Tax or VAT Act, is supposed to know ill-consequences of filing return of income, concealing the income or furnishing inaccurate particulars in the return and still the appellant/assessee did not disclose the income from different sources. If an ordinary man made such mistake, there is some justification in doing so, but here the appellant/assessee being the Sales Tax practitioner is not

supposed to conceal the income of his own to escape from tax liability. Taking into consideration of the profession of the appellant/assessee, it is difficult to accept the contention of the appellant/assessee that he bonafidely failed to disclose the income. Therefore, the contention that there are bonafides on the part of the appellant/assessee in his failure to disclose the income, is not acceptable.

In “**Commissioner of Income Tax, Delhi v. Atul Mohan Bindal**”^[10], the Apex Court held that even if the non-disclosure is unintentional and inadvertent omission to include income for assessment, if conditions laid down in Section 271 (1) (c) of the Act exist, Assessing Officer has no discretion left with him but to impose penalty. In the facts of the above decision, the assessee filed return without disclosing salary received in Singapore, amount received from his previous employer and interest from bank, tax assessed on entire income and penalty imposed for concealment of income from assessment. Assessee accepted the assessment but challenged penalty contending that he was under bona fide impression that the said incomes were exempt from tax. But the Commissioner of Income Tax (Appeals) set aside penalty holding that assessee neither concealed details nor furnished inaccurate particulars relying on the decision rendered in “**CIT v. Ram Commercial Enterprises Ltd.**”^[11], which was approved by the Supreme Court in “**Dilip N.Shroff Case v. CIT**”^[12]. In “**Union of India and others v. Dharamendra Textile Processors and others**”^[13], it is held that Dilip N.Shroff’s case did not lay down correct law as the difference between Section 271 (1) (c) and Section 276 (c) of the Act was lost sight of, while holding that the explanations appended to Section 271 (1) (c) of the Act entirely

indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in Dilip N.Sharoff's case (referred supra) has not considered the effect and relevance of Section 276-C of the Act. Object behind enactment of Section 271 (1) (c) read with explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276-C of the Act. The decision in "Union of India and others v. Dharamendra Textile Processors and others" (referred supra) has been explained in "***Union of India v. Rajasthan Spinning and Weaving Mills***"^[14],

Thus, the law laid down in "Dilip N.Shroff's case is no more good law in view of the decision in "Union of India and others v. Dharamendra Textile Processors and others" and "Union of India v. Rajasthan Spinning and Weaving Mills" (referred supra).

The quantum of penalty is prescribed in Clause (iii). Explanation 1, appended to Section 271(1)(c) of the Act, it provides that if that person fails to offer an explanation or the explanation offered by such person is found to be false or the explanation offered by him is not substantiated and he fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income has been disclosed by him, for the purposes of Section 271(1)(c), the amount added or disallowed in computing the total income is deemed to represent the concealed income. The penalty spoken of in Section 271(1)(c) is neither criminal nor quasi-criminal but a civil liability; albeit, a strict liability. Such liability being civil in nature, ***mens rea***

is not essential to decide the liability to pay penalty by the assessee in view of the judgment referred supra.

Therefore, non-disclosure of income, which is deposited in 27 accounts with various banks and cash found in his during search and seizure and admitted by the petitioner, who accepted the assessment of income from different sources is not entitled to challenge the penalty proceedings on the ground that he bonafidely believed that he need not disclose the income.

As discussed above, the assessee did not prefer any appeal against the assessment order, though there was addition of Rs.9,16,321/- after initiating proceedings under Section 147 of the Act. However, challenged the penalty order alone on the ground that he bonafidely believed that he need not disclose the particulars of the income from other sources. But no such plea was raised before the Assessing Officer, Commissioner of Income Tax and the Income Tax Appellate Tribunal, for the first time, such plea was raised placing reliance on the judgment of the Madhya Pradesh High Court (Indore Bench) in “Commissioner of Income Tax, Indore v. Suresh Chandra Mittal” and the same was confirmed by the Apex Court (reference 1st supra). In the said case, proceedings under Section 271 (1) (c) of the Act were initiated for concealment of income and the assessee filed revised returns under Section 148 of the Act showing higher income, thereafter, assessment order was passed and revised returns regularised under Section 148 of the Act without any objection from the Revenue. In penalty proceedings, the assessee pleaded that he had submitted the revised returns to buy peace and to come out of vexed litigation. Thereupon, the High Court accepted that the explanation of the assessee was bonafide and upheld the order passed by the Commissioner of Income Tax and set aside the penalty order. The

matter carried to the Supreme Court and the Supreme Court also confirmed the order of the High Court of Madhya Pradesh.

The principle laid down in the above judgment has no application to the present facts of the case for the reason that in the said case the assessee pleaded that he accepted the assessment to buy peace and to come out of vexed litigation and gave an explanation that he bonafidely believed that he need not disclose the income and proved bonafides, but in the present case no such plea was raised before the authorities. Yet, in the above decision of Madhya Pradesh High Court, no law was declared. But, for the first time, such plea was raised, on the other hand in the grounds of appeal, in ground No.8 it is contended that the Tribunal ought to have dropped the penalty proceedings in the similar way as was done for the assessment years between 2003 and 2009 as the facts and circumstances were similar in nature in all the assessment years including 2002-2003. It appears from the ground urged in ground No.8 of grounds of appeal that the assessee concealed the income under bona fide impression for the assessment years between 2003 and 2009 also, but for one reason or other, the authorities accepted the same. It is evident from the grounds of appeal, the appellant/assessee being a tax practitioner, for the obvious reasons known to him, filed returns concealing income from different sources and taking advantage of law, avoiding the liability to pay penalty.

In any view of the matter, it is clear from the material on record that the appellant/ assessee failed to disclose the income or concealed the income from different sources, filed the return and the same was accepted. However, during search and seizure operation under Section 132 of the Act conducted at Rajiv Gandhi International Airport, Hyderabad, the appellant/assessee was found

in possession of Rs.12,65,900/- and the authorities seized Rs.12,00,000/-. The authorities also collected the accounts statements from the banks pertaining to the appellant/assessee and found that there are deposits and withdrawals at regular intervals, but those amounts are not reflected in the returns filed by the appellant/assessee for the reasons best known to him. Such non-disclosure would directly attract the provisions of Section 271 (1) (c) of the Act as it deals with concealment of income from different sources by the assessee.

The Assessing Officer imposed penalty by exercising power under Section 271 (1) (c) of the Act, which was confirmed by the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal. Even otherwise, bonafides pleaded by assessee is a question of fact and that would not give rise to substantial question of law before this Court as the appeal under Section 260-A of the Act can be admitted only if substantial question of law is made out by the appellant. The ground urged before this Court that the appellant/assessee bonafidely did not disclose the income is a question of fact, which cannot be enquired into by this Court in view of our aforesaid discussions. The facts on record did not give rise to any substantial question of law, which is essential to admit the appeal. Hence, we find no ground to interfere with the impugned order passed by the Income Tax Appellate Tribunal. Therefore, the appeal fails. Accordingly, the point is answered in favour of the respondents and against the appellant/assessee.

In the result, the appeal is dismissed at the stage of admission itself confirming the order passed by the Income Tax Appellate Tribunal in ITA No.1002/HYD/2015 dated 30.10.2015. No order as to costs. Consequently, miscellaneous petitions, if any, pending shall stand dismissed.

JUSTICE RAMESH RANGANATHAN

JUSTICE M.SATYANARAYANA MURTHY

14.07.2016.

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[1] (2003) 11 Supreme Court Cases 729
[2] (2007) 8 SCC 155
[3] 2001(3) SCC 179
[4] (2012) 8 SCC 148
[5] (2008) 12 Supreme Court Cases 458
[6] (2007) 7 SCC 162
[7] (2001) 247 ITR (SC)
[8] 1995 Supp (2) SCC 187
[9] (1994) 205 ITR 244 (SC)
[10] (2009) 9 Supreme Court Cases 589
[11] (2000) 246 ITR 568 (Del)
[12] (2007) 6 SCC 329
[13] (2008) 13 SCC 369
[14] (2009) 13 Supreme Court Cases 448