IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.08.2017

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE

AND

The Hon'ble MR.JUSTICE M.SUNDAR

T.C.A. Nos.639 and 640 of 2017

M/s.P.A.S. Oil Pvt. Ltd.
16, Nainar Nadar Street,
Mylapore, Chennai 600 018. .. Appellant in both TCAs.

-vs-

The Assistant Commissioner of
Income Tax, Circle V(1),
The Income Tax Department,
121, Nungambakkam High Road,
Chennai- 600 034. .. Respondents in both TCAs.

Appeals filed under Section 260A of the Income Tax Act, 1961, against the common order dated 26.06.2014 passed in I.T.A.Nos.1262/Mds/2011 and 1263/Mds/2011 on the file of the Income Tax Appellate Tribunal, "A" Bench, Chennai, in respect of Assessment Year 2003-04. and 2004 - 05 against the order of the commissioner of income tax (Appeals)-V, Chennai, dt.04.04.2011 in I.T.A.No.627/08-09, and I.T.A.No.283/06-07 and 1375/06-07 caring out of order of Assistant commissioner of Income Tax company circle V(1), chennat dt, 13.03.06 and order no.AAACP1929L/51235-P/2003-04, dt. 17.08.06 Respectively,

For Appellant : Mr.S.Sridhar
For Respondents : Mr.T.Ravikumar,
Sr. Stng. Counsel, assisted by
Mr.K.Suresh Kumar and
Mr.Vijay Kumar Punna/Jr.Stg.Cnsl.

* * * * *

COMMON JUDGMENT
(Judgment of the Court was delivered by The Hon'ble Chief Justice)

These two appeals are against the common order dated 26.06.2014 of the Income Tax Appellate Tribunal, 'A' Bench, Chennai, whereby the Revenue's appeals being I.T.A.Nos.1262/Mds/2011 and 1263/Mds/2011 have been allowed.

2.The appellant/assessee is a company engaged in the business of import and sale of superior kerosene oil. On 01.12.2003, the appellant/assessee filed its return for the Financial Year 2002-03 corresponding to the Assessment Year 2003-2004 disclosing an income of Rs.21,82,830/-. The return was processed.

3.However, on scrutiny, the Assessing Officer found from the assessee's books, an expenditure of Rs.32,85,600/- qua commission paid for brokerage and sales @ 2% thereof. It was pleaded that payments of Rs.8,36,273/- had been made to Shri.Sivasubramaniam, Rs.8,44,052/- to Shri.Rajalingam, Rs.5,84,654/- to Shri.Manoharan and Rs.8,48,127/- to Shri.Shanmuganathan. By letters dated 02.02.2006 and 07.02.2006 addressed to the Assessing Officer, the appellant/assessee claimed to have made the aforesaid payments by way of four different cheques dated 21.01.2004 and 11.02.2004.

4.The Assessing Officer issued notice under Section 131 of the Income Tax Act to Tamilnadu Mercantile Bank calling for photocopies of the cheques along with the relevant details.

5.In response, the bank wrote a letter dated 22.02.2006 enclosing the photocopies of the above stated cheques and clarified that the names of the payees therein were interpolated with 'cash' and the assessee's Directors, namely, Shri.Sharavana Kumar and Shri.S.Senthilkumar had encashed the same.

6.The Assessing Officer formed the opinion that the appellant/ assessee had raised false/bogus claim of payment of commission and expenditure on brokerage.

7.The Authorised Representative of the appellant/assessee filed a letter dated 01.03.2006 agreeing to the disallowance and/or addition for want of address of payees and the appellant/assessee also duly paid Rs.6,00,000/- as tax.

8.The learned Tribunal extracted the contents of the letter dated 01.03.2006 from the appellant/assessee to the Assistant Commissioner of Income Tax, wherein it is stated that

> "...We have engaged the service of the brokers who procure orders for us from all over the state. In consideration of their service we have paid a sum of Rs.32,85,600 as brokerage and commission to them after

duly deduction tax at source. Since the business of SKO is discontinued we are not having any transaction with the brokers at present, hence we are unable to furnish you the recent address of the brokers immediately. In view of the above in order to purchase peace with the department, we hereby offer the sum of Rs.32,85,600 which is paid as brokerage for assessment. In this connection we are enclosing herewith the revised computation after duly adding back the above sum. We hereby undertake to pay the tax thereon. We have also paid a sum of Rs.6,00,000/- on 27.02.2006 at Indian Bank, Dr.Radhakrishnan Salai Branch. It is requested that since the payments could not be proved which is beyond our control penalty may not be initiated.

REVISED COMPUTATION OF TOTAL INCOME

Returned income	21,82,800
Add: Brokerage & Commission disallowed	32,85,600
	52,68,430
Tax working	
Tax on above	18,43,950
Add: surcharge @ 5%	92,197
	19,36,147
Less: TDS	1,07,000
	18,29,147
Less: Advance Tax 15.3.2004	3,00,000
	15,29,147
Add: Interest u/s 234B 1,07,037 u/s 234C 89,371	1,96,408
	17,25,555
Less: 140A	4,71,714
	12,53,841
Add: Interest u/s 234B 29 months	3,63,602
	16,17,443
Less: Tax on regular assessment paid on 27.2.2006	6,00,000
	10,17,443

We are enclosing herewith the copy of tax paid challan together with original for your perusal and return. Since the business of SKO is stoppen and in the absence of liquid resources, we hereby undertake to pay the balance amount of tax within one month from the date of order."

9.It appears that the appellant/assessee subsequently on 18.08.2006 and again on 01.09.2006 submitted representations to the Commissioner of Income Tax, Chennai-III, seeking stay of collection of tax and for lifting the bank attachment as well as recovery of penalty under Section 271(1)(c) of the Income Tax Act.

10.In the appeal filed by the appellant/assessee before the Commissioner of Income Tax (Appeals) [in short 'CIT (A)] challenging the disallowance of Rs.32,85,600/-, the addition was deleted by the CIT (A) by an order dated 04.04.2011. Being aggrieved, the Revenue appealed before the learned Tribunal. Another appeal was filed by the Revenue against the setting aside of the penalty imposed by the Assessing Officer.

11.The learned Tribunal found that the assessee's action by paying Rs.6,00,000/- as tax and its two letters through its Managing Director proved that the assessee had agreed to the disallowance. That being the case, the appellant/assessee was estopped from raising any doubt about the authenticity of the surrender on 1st March, 2006. The learned Tribunal found that once the assessee had failed to discharge its onus to prove the payment of commission/brokerage, the Revenue's appeal would succeed. The appeal in I.T.A.No.1262/Mds/ 2011 filed by the Revenue was, accordingly, allowed and the deletion of commission/brokerage expenditure of Rs.32,85,600/- was restored.

12.Dealing with the appeal being I.T.A.No.1263/Mds/2011 relating to penalty, the learned Tribunal found that the penalty had been imposed since the assessee had taken different stands in quantum proceedings. The Assessing Officer had found that the Directors of the assessee had themselves encashed the cheques after interpolations in payees' names and it was only thereafter that the appellant/assessee chose to make the so-called voluntary surrender. In the absence of any cogent explanation tendered by the appellant/assessee, the Tribunal held that its false claim on commission/brokerage expenditure amounted to concealment and furnishing of inaccurate particulars of income under Section 271(1)(c) of the Income Tax Act. The appeal of the Revenue was, thus, allowed and the penalty of Rs.12,07,238/- was restored.

13.The learned Tribunal has arrived at the factual finding that the claim of the appellant/assessee to the expenditure of commission/ brokerage was a bogus claim and accordingly, penalty was imposed. As against the said judgment, the assessee has filed the present appeals before this Court.

14.The short question before us is whether these appeals filed by the Assessee against the order of the Tribunal should be entertained?

15.Section 260A of the Income Tax Act, 1961, provides as follows:

> "Section 260A. Appeal to High Court.
>
> (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) The Principal Chief Commissioner or Chief Commissioner or the Principal Commissioner or Commissioner or an Assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-
>
> (a) filed within one hundred and twenty days from the date on which the order appealed against is received by the Assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.
>
> (b) [***];
>
> (c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.
>
> (2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.
>
> (3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (4) The appeal shall be heard only on the question so formulated, and the respondents shall at the hearing of the appeal, be allowed to argue that the case does not involve such question:
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the

appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

16.An appeal lies under Section 260-A of the IT Act, only when there is a substantial question of law. We find that there is no question of law involved in these appeals much less any substantial question of law.

17.In Sir Chunilal V. Mehta & Sons Ltd. vs Century Spg. & Mfg. Co. Ltd., reported in AIR 1962 SC 1314, the Supreme Court agreed with and approved a Full Bench Judgment of this Court in Rimmalapudi Subba Rao vs Noony Veeraju And Ors reported in AIR 1951 Mad 969 and laid down the principles for deciding when a question of law becomes a substantial question of law.

18.In Hero Vinoth Vs. Seshammal reported in (2006) 5 SCC 545, the Supreme Court followed Sir Chunilal V. Mehta & Sons (supra) and other judgments and summarized the tests to find out whether a given set of questions of law were mere questions of law or substantial questions of law.

19.The relevant paragraphs of the judgment of the Supreme Court in Hero Vinoth (supra) are set out herein below :

"21. The phrase "substantial question of law", as occurring in the amended Section 100 CPC is not defined in the Code. The word substantial, as qualifying "question of law", means—of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with—technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. Ram Ditta [(1927-28) 55 IA 235 : AIR 1928 PC 172] the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju [AIR 1951 Mad 969 : (1951) 2 MLJ 222 (FB)] : (Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR p. 557)

> "When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."

This Court laid down the following test as proper test, for determining whether a question of law raised in the case is substantial: (Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR pp. 557-58)

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

22. In Dy. Commr. v. Rama Krishna Narain [1954 SCR 506 : AIR 1953 SC 521] also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to a certificate under (the then) Section 100 CPC.

23. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See Santosh Hazari v. Purushottam Tiwari

[(2001) 3 SCC 179] .)

24.The principles relating to Section 100 CPC relevant for this case may be summarised thus :
(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law .
(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision based on no evidence”, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

20.In M.Janardhana Rao Vs. Joint Commissioner of Income Tax [2005 273 ITR 50 (SC)], the Hon'ble Supreme Court held that the principles contemplated under Section 100 of the Code of Civil Procedure would apply to Section 260-A of the IT Act too.

21.Right of appeal is not automatic. Right of appeal is conferred by statute. When statute confers a limited right of appeal only in a case which involves substantial questions of law, it is not open for this Court to sit in appeal over the factual findings arrived at by the Appellate Tribunal.

22.The learned counsel appearing on behalf of the appellant/ assessee cited the Division Bench judgment of this Court in Commissioner of Income Tax vs. Balaha Chemicals Agencies reported in (2015) 94 CCH 0163. In the said case, this Court found that the Revenue had not been in a position to show that the payments of commission made by the assessee were bogus in nature. There was also nothing on record to show that the assessee had concealed particulars of income or furnished inaccurate particulars of income. The appeals of the Revenue were, accordingly, found to be without merit and dismissed the same.

23.The learned counsel for the appellant/assessee cited a Division Bench judgment of this Court in N.Ranjit vs. Commissioner of Income Tax-V reported in (2013) 85 CCH 0102 ChenHC, where the Division Bench upheld the decision of the Tribunal and dismissed the appeal of the Revenue with the following observations:

> "12.It is not that every case of addition warrants levy of penalty. The application of penal provisions are not automatic and the levy itself depends upon the facts and circumstances of each case. On the incorrectness of the returns originally filed, not disclosing the transaction in shares, the proceedings susbequent to the statement filed certainly indicates the conduct of the assessee. Thus in view of the decision of the Apex Court reported in 2009 (233) E.L.T. 3 (S.C.) Union of India vs. Rajasthan Spinning & Weaving Mills) on the law propounded on penalty, we reject this Tax Case Appeal and thereby confirm the order of the Tribunal."

24.Imposition of penalty undoubtedly depends on the facts and circumstances of the case. Section 271(1)(c) of the

Income Tax Act, 1961 (hereinafter referred to as the "1961 Act") provides that if the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner, in the course of any proceedings under the 1961 Act, is satisfied that any person has concealed particulars of his income or furnished inaccurate particulars of income, he may direct the person to pay penalty as stipulated.

25.Explanation I to Section 271 of the 1961 Act is set out herein below for convenience:

> "Explanation 1.—Where in respect of any facts material to the computation of the total income of any person under this Act,—
>
> (A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, or
>
> (B) 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) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

26.In view of Explanation I, referred to above, the amount added or disallowed in computing the total income of the assessee is, for the purpose of Section 271(1)(c), to be deemed to represent his income in respect of which particulars have been concealed, only if the assessee fails to offer an explanation or offers an explanation which is found by the Assessing Authority to be false or if the assessee offers an explanation which he is unable to substantiate and fails to prove that the explanation was bona fide and that facts material to the computation of his total income had been disclosed by him.

27.Under Section 271(1)(c) of the 1961 Act, the imposition of penalty is not automatic whenever there is less income returned. The pre-condition for imposition of penalty is subjective satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or the Commissioner, as the case may be, that the assessee has concealed particulars of his income or furnished inaccurate particulars of such income. The furnishing of inaccurate particulars would have to be deliberate.

28.In view of Explanation I, referred to above, there is no requirement on the part of the Revenue to establish mens rea for the purpose of imposition of penalty. Mere satisfaction of concealment and/or furnishing of inaccurate particulars would in itself attract the penal provisions.

29.In Sir Shadilal Sugar & General Mills Ltd. v. Commissioner of Income Tax, reported in (1987) 168 ITR 705, the Assessee had agreed to additions to his income to buy peace. The Supreme Court held that it did not follow that the amount that was agreed to be added was concealed income. The Revenue was, therefore, required to prove mens rea.

30.However, in K.P.Madhusudhanan v. Commissioner of Income Tax, reported in (2001) 251 ITR 0099 (SC), the Supreme Court held that the Explanation to Section 271(1)(c) of the 1961 Act is a part of Section 271. When the Income Tax Officer or the Appellate Assistant Commissioner issues to an Assessee a notice under Section 271 of the 1961 Act, he makes the Assessee aware that the provisions thereof are to be used against him. These provisions include the Explanation. By reason of the Explanation, where the total income returned by the Assessee is less than 80 per cent of the total income assessed under Sections 143 or 144 or 147, reduced to the extent therein provided, the Assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof, unless he proves that the failure to return the correct income did not arise from any fraud or neglect on his part. The Assessee is, therefore, by virtue of the notice under Section 271 of the 1961 Act put to notice that if he does not prove, in the circumstances stated in the Explanation, that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and, consequently, be liable to penalty.

31.In K.P.Madhusudhanan (supra), the Supreme Court differed from and disapproved its earlier view in Sir Shadilal Sugar & General Mills Ltd. (supra) that the Revenue was required to prove mens rea for imposition of penalty. The proposition in Sir Shadilal Sugar & General Mills Ltd (supra) that the Revenue is required to prove mens rea for imposition of penalty is no longer good law.

32.The case of K.P.Madhusudhanan (supra), is clearly distinguishable, as it was a case of concealment, where income of Rs.93,000/- had not been disclosed. Only after explanation was called for, the Assessee in that case stated that it had obtained loans, which could not be established and ultimately, the concealed income was treated as additional income. In the background of the aforesaid facts, penalty was imposed. The Supreme Court rejected the contention that the onus lay on the Assessing Officer to establish mens rea. In effect and substance, the Supreme Court held that on receipt of a notice, it was for the Assessee to explain, that concealment was not deliberate.

33.After the insertion of the Explanation, it cannot be said that the onus lies on the Revenue to establish mens rea for concealment of income before imposition of penalty. If there was failure to return the correct income, there would be a presumption of concealment, unless the Assessee was able to prove that his failure to return his correct income was not due to fraud or neglect.

34.In M.A.K.Data P. Ltd. v. Commissioner of Income Tax, reported in (2013) 358 ITR 0593 (SC), the Supreme Court held that the Explanation to Section 271(1)(c) of the Act raises a presumption of concealment, when a difference is noticed by the Assessing Officer, between reported and assessed income. The burden is then on the Assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the Explanation has been discharged by the Assessee, the onus shifts on the Revenue to show that the amount in question constituted the income of the Assessee and not otherwise.

35.In the aforesaid case, the contention of the Assessee of having surrendered the additional sum of Rs.40,74,000/- to avoid litigation, buy peace and to channelize energy and resources towards productive work and to make amicable settlement with the Income Tax Department was not accepted. The Supreme Court held that voluntary disclosure did not release the Assessee from the mischief of penal proceedings. Voluntary disclosure of concealed income did not absolve the Assessee from penalty. The Supreme Court also held that the Assessing Officer was not required to record his satisfaction of concealment of particulars of income in any particular way or to reduce it into writing.

36.In CRN Investments (P) Ltd. v. Commissioner of Income Tax, reported in (2008) 300 ITR 0342 (Madras), a Division Bench of this Court found that there was claim for supply of steel rolls, when in fact there was never any supply. Bills had been raised to facilitate finance from credit institutions and the alleged lease transaction was found to be false and a make believe one. The Assessee resisted the claim of the department contending that they were not aware of forged documents and contended that they had not concealed income nor furnished inaccurate particulars. There was no dispute that the documents were forged.

37.In the aforesaid case, the learned Tribunal had upheld the imposition of penalty. The Division Bench found that the conclusion was factual giving rise to no questions of law. Considering the limited scope of Section 260A of the Act, the Division Bench did not find any justification to disturb the order of the learned Tribunal and, accordingly, the appeal was dismissed.

38.In Union of India v. Dharamendra Textile Processors, reported in (2008) 13 SCC 369, the Supreme Court observed as under:

> "17. It is of significance to note that the conceptual and contextual difference between Section 271(1)(c) and Section 276-C of the IT Act was lost sight of in Dilip N. Shroff v. CIT, (2007) 6 SCC 329.
>
> 18. The Explanations appended to Section 271 (1)(c) of the IT 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. Shroff case has not considered the effect and relevance of Section 276-C of the IT 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 IT Act."

39.The proposition of law enunciated in Dharamendra Textile Processors (supra) is unexceptionable. However, in the present case, as observed above, the learned Tribunal, the fact finding body, has arrived at a finding on facts that there was concealment and hence, the interference of this Court under Section 260A of the Act is not warranted.

40.In Commissioner of Income Tax, Delhi v. Atul Mohan Bindal, reported in (2000) 9 SCC 589, the Supreme Court referred to and explained its earlier decision in Dharamendra Textile Processors case (supra) and found that there was an element of strict liability on the Assessee for concealment and for giving inaccurate particulars in view of the explanation appended to Section 271(1)(c) of the Act. The Supreme Court concluded that for applicability of Section 271(1)(c) of the Act, the conditions stated therein must exist.

41.The proposition of law that emerges from the judgments referred to above is that in view of the explanation added, it cannot be said that the onus lies on the Revenue to establish mens rea in cases of concealment and/or short payment of tax. There is an onus on the Assessee to show that there was no mens rea. Whether the Assessee has been able to discharge the onus of establishing that there was no concealment or deliberate furnishing of inaccurate particulars of income, would depend on the facts and circumstances of the case.

42.In Lanxess India (P) Ltd. v. Assistant Commissioner of Income Tax, reported in (2015) 60 Taxmann.com 352 (Madras), a Division Bench of this Court, having regard to the facts of that case, found that the department was justified in imposing penalty as the explanation of the Assessee in that case was no explanation at all in the eye of law. The Division Bench also found that the facts had thoroughly been examined by the Tribunal and rightly held against the Assessee. The Division Bench found that there was no question of law, far less any substantial question of law, arising for consideration in the appeal and, accordingly, dismissed the appeal. In this case too, there is no question of law, far less any substantial question of law. We are in full agreement with the Division Bench that when the appeal does not raise any substantial question of law, the appeal is liable to be dismissed.

43.The judgment of the High Court of Karnataka in United Breweries Ltd. v. Deputy Commissioner of Income Tax, Central Circle-2(3), Bangalore, reported in (2016) 72 Taxmann.com 102 (Karnataka), is clearly distinguishable on facts. That was a case where the Assessee had made advances to a Controlled Company and also incurred expenditure and debited these amounts to the account of the Controlled Company. The Tribunal opined that this might be prudent business practice or might have arisen because of the Assessee's anxiety to save its Controlled Company from facing financial crunch. However, this did not in itself afford nexus between the Assessee's business and the loss. The Tribunal was of the view that the loss could not be allowed as a business loss under Section 28 of the 1961 Act and confirmed the disallowance. The High Court rejected the appeal.

That was not a case of imposition of penalty.

44.A judgment is a precedent for the issue of law which is raised and decided. A decision rendered in the particular facts and circumstances of a case does not constitute a binding precedent.

45.The initiation of penal proceedings is not automatic and depends upon the facts and circumstances of each case. In the case at hand, the learned Tribunal arrived at factual findings which ought not to be interfered with in an appeal under Section 260A of the Income Tax Act. In this case, the learned Tribunal, as observed above, arrived at the finding that the claim to the expenditure towards brokerage/commission was bogus and in effect, held that imposition of penalty was justified.

46.We do not find any question of law, far less any substantial question of law that warrants interference.

47.These Tax Case Appeals, therefore, not entertained and the same are dismissed. No costs.

Sd/-
Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

sra

To

1.The Assistant Registrar,
Income Tax Appellate Tribunal
''A'' Bench, Chennai.

2.The Commissioner of Income-tax
(Appeals)-V, Chennai.

3.The Assistant Commissioner of Income Tax,
Company Circle-V(1), Chennai-34.

+2cc to Mr.T.RAVIKUMAR,Standing counsel S.R.No.62463 & 62462
+1cc to Mr.SRIDHAR, Advocate, S.R.No. 62460

T.C.A. Nos.639 and 640 of 2016

NRI(CO)
TR(06/12/2017)