

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.01.2018

CORAM

THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE ABDUL QUDDHOSE

Tax Case (Appeal) No.771 of 2017

Principal Commissioner of Income Tax-6,
No.121, Nungambakkam High Road,
Chennai - 600 034. ... Appellant/Respondent

Vs.

M/s.Sundaram Fasteners Limited,
98-A, 7th Floor,
Dr. Radhakrishnan Salai,
Mylapore,
Chennai - 600 004
PAN: AAA CS 8779 D ... Respondent/Appellant

PRAYER: Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "D" Bench, Chennai, dated 26.4.2017 passed in I.T.A.No.676/Mds/2012, against the order of Commissioner of Income Tax (Appeals)-VI, Chennai dated 23.12.2011 in I.T.A.No.454/10-11, against the order of Assistant Commissioner of Income Tax, Company Circle VI(4), dated 24.03.2009 in G.I. NO.Su.49/AAACS8779D/2004-05 against the assessment order, dated 29.12.2006 made in PAN/GIR NO.AAACS8779D for the assessment year 2004-05.

For Appellant : Mr.T.R.Senthil Kumar
Standing Counsel

JUDGMENT
(Delivered by the Hon'ble Chief Justice)

This appeal is against an order dated 26th April 2017 passed by the Income Tax Appellate Tribunal Bench "D", Chennai in the appeal being I.T.A.No.590/Mds/2012 in relation to the Assessment Year 2004-2005, whereby the learned Tribunal has confirmed the deletion of penalty under Section 271(1)(c) of the Income Tax Act, 1961.

2. The respondent assessee is apparently a manufacturer of automobile components like fasteners, radiator caps, gear shifters etc.

3. The respondent assessee filed its return of income for the Assessment Year 2004-2005 on 1st November 2004 declaring total income of Rs.68,36,53,980/-. Subsequently, a revised return was filed on 24th May 2005 returning income of Rs.67,72,35,020/-.

4. The return was processed under Section 143(1) of the Income Tax Act, 1961 and thereafter, on 23rd August 2005, the case of the Assessee was selected for scrutiny. Fresh notices were issued to the respondent Assessee under Section 143(2) of the Income Tax Act, pursuant to which, the representative of the respondent assessee appeared before the Assessing Officer to explain the stand of the respondent assessee. Thereafter, an Assessment Order was passed on 29.12.2006.

5. From the order of assessment, it appears that the Assessee had claimed deduction under Section 80IB of Rs.2,77,65,509/-, which was disallowed on the ground that all the four Units of the respondent assessee were in Puducherry. Only first two Units had made profit, but the other two Units had incurred losses and putting all the four Units together there was loss of Rs.2,92,51,758/-. The Assessing Officer also disallowed certain claims to depreciation on air and water pollution control equipment. The details of the disallowances are as hereunder:

Sl. No.	Particulars	Amount added/assessed Rs.
1	Under Section 14A	1,40,729.00
2	Depreciation on air and water pollution equipment	1,40,56,407.00
3	Interest free loan	1,10,04,157.00
4	Deduction under Section 80IB	2,77,65,509.00
5	Deduction under Section 80HHC restricted to Rs.5,13,56,427/-	
6	Depreciation on furnace cost	18,85,394.00

6. On behalf of the Revenue, it is submitted that deletion of deduction under Section 80IB had been upheld by the Appellate Commissioner and by the learned Tribunal. This is not in dispute.

7. The Assessing Officer initiated separate proceedings under Section 271(1)(c) for penalty and by an order dated 24th March 2009, imposed penalty of Rs.1,50,03,613/- that is 100% penalty on the tax demanded.

8. Being aggrieved by the imposition of penalty, the respondent Assessee filed an appeal in the office of the Commissioner of Income Tax (Appeals) - VI being I.T.A.No.454/10-11. In fact, there were three grounds of appeal. The first ground dealt with levy of penalty on the disallowance of depreciation on hardening and tempering furnace; the second ground dealt with claim of depreciation on Hardening and Tempering furnace purchased from San-Yang Electric Heat Machine Company Limited, Taiwan and the third ground related to levy of penalty under Section 271(1)(c) on the disallowance of claim of deduction under Section 80IB of the Income Tax Act, 1961.

9. The learned Appellate Commissioner upheld and/or confirmed the deletion of penalty under Section 271(1)(c) for disallowance of claim of deduction under Section 80IB inter alia holding "Disallowance of claim u/s 80IB was made by interpretation of the provisions of the said Section wherein by the process of interpretation the appellant company was found not eligible for the said deduction. For the purpose of levy of penalty u/s 271(1)(c) the main ingredient which is required to be justified is the defaulter should have concealed particulars of income or furnished inaccurate particulars. In my view the appellant company having furnished all the details relating to the claim and the claim having been disallowed only on account of interpretation of law has not defaulted u/s 271(1)(c) and hence I delete the penalty levied on disallowance of claim u/s 80IB. This ground of appeal is allowed". The appeal of the respondent assessee was thus allowed in part.

10. Both the Revenue and the respondent assessee appealed against the order of the Appellate Commissioner. The appeal of the respondent assessee being I.T.A.No.590/Mds/2012 and the Cross- Appeal of the Revenue being I.T.A.No.676/Mds/2012, have been disposed of by a common order under appeal.

11. The learned Tribunal found that the respondent Assessee had a reasonable basis to stake a claim for deduction under Section 80IB, which had been disallowed upon interpretation of the provision. There was no ground for levy of penalty for furnishing inaccurate particulars of income. The deletion of penalty made by the Appellate Commissioner was thus confirmed.

12. 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."

13. 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 this appeal much less any substantial question of law.

14. 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.

15. 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.

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

"21. 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 *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."

.....

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."

17. 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 Income Tax Act too.

18. 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 to this Court to sit in appeal over the factual findings arrived at by the Appellate Tribunal.

19. In the instant case, the learned Tribunal has arrived at the factual finding that there was no concealment nor furnishing of inaccurate particulars of income.

20. In *K.P. Madhusudhanan v. Commissioner of Income Tax*, reported in (2001) 251 ITR 0099 (SC), the Supreme Court held:

"5. The Explanation to Section 271(1)(c) 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, 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 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 the penalty provided by that Section.

6. Learned counsel for the Assessee then drew our attention to the judgment of this Court in *Sir Shadilal Sugar and General Mills Ltd. & Anr. Vs. Commissioner of Income-Tax, Delhi* MANU/SC/0364/1987. He submitted that the Assessee had agreed to the additions to his income referred to hereinabove to buy peace and it did not follow therefrom that the amount that was agreed to be added was concealed income. That it did not follow that the amount agreed to be added was concealed income is undoubtedly what was laid down by this Court in the case of *Sir Shadilal Sugar and General Mills Ltd.* and that, therefore, the Revenue was required to prove the mens rea of a quasi-criminal offence. But it was because of the view taken in this and other judgments that the Explanation to Section 271 was added. By reason of the addition of that Explanation, the view taken in this case can no longer be said to be applicable."

21. 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.

22. The Explanation to Section 271 makes it clear that, if in cases of concealment of particulars of income or furnishing of inaccurate particulars of income, the assessee fails to offer an explanation or offers an explanation which is found by the ITO or the AAC to be false or offers an explanation which he is not able to substantiate, the amount added or disallowed in computing the total income of such person shall for the purpose

of clause (c) i.e., for the purpose of concealment, be deemed to represent the income in respect of which particulars have been concealed. Proviso to Explanation makes it clear that the Explanation is not to apply to a case in respect of any amount added or disallowed as a result of the rejection of any explanation offered by such person, if such explanation is bonafide and all the facts relating to the same and material to the computation of his total income have been disclosed by him.

23. 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.

24. In the instant case, as observed above, the learned Tribunal arrived at the finding that disallowance was due to interpretation of the applicable provision of the Income Tax Act. There was no concealment.

25. 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 him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

26. 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 the 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. Then 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.

27. In *N.Ranjit v. Commissioner of Income Tax-V, Chennai*, reported in (2013) 262 CTR 411 (Madras), a Division Bench of this Court did not find justifiable grounds to set aside the order of the Tribunal, upholding the levy of penalty under Section 271(1)(c) of the Act having regard to the facts of that

case. The Division Bench, however, held that it was not that every case of addition warranted levy of penalty. To quote the Division Bench "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 subsequent to the statement filed certainly indicates the conduct of the Assessee."

28. Both M.A.K.Data P. Ltd., supra and N.Ranjit, supra, were clear cases of concealment of income. There can be no dispute with the proposition that the conduct of concealment is indicative of the conduct of the assessee. However, in this case, the disallowance was by reason of interpretation of Section 80IB of the Income Tax Act, 1961. The learned Tribunal, which is a fact finding body, arrived at the factual finding that there was no concealment of income. The judgments, referred to above, are clearly distinguishable.

29. However, we are in full agreement with the Division Bench that application of penal proceedings are not automatic and the levy depends upon the facts and circumstances of each case. In the case on hand, having regard to the particular facts and circumstances of this case, the Appellate Commissioner has allowed the appeal and deleted the penalty, which the learned Tribunal has confirmed.

30. 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.

31. 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.

32. 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."

33. The proposition of law enunciated in Dharamendra Textile Processors (supra) is unexceptionable. However, as observed above, there was no concealment in this case and in any case, when the Appellate Tribunal, the fact finding body, has arrived at a finding on facts that there was no concealment, the interference of this Court under Section 260A of the Act is not warranted.

34. 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.

35. 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. Whether the Assessee has been able to discharge the onus would depend on the facts and circumstances of the case.

36. In the instant case, the learned Tribunal, in effect, arrived at a clear finding that imposition of penalty was not justified having regard to the facts and circumstances of the case.

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

38. This appeal is, therefore, not entertained and accordingly dismissed.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

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To:

1. The Registrar
Income Tax Appellate Tribunal
"D" Bench, Chennai.
2. The Commissioner of Income Tax (Appeals)-6
Chennai - 600 034.
3. The Joint Commissioner of Income Tax,
Company Range-VI,
Chennai.

+ 1 cc to MR. T.R. Senthilkumar, Advocate Sr.7186

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