IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1370 OF 2017

Vijay Bhagwandas Raheja ....Appellant

V/s.

Deputy Commissioner of Income Tax
Central Circle – 29 and Anr. ...Respondents

Mr. K. Gopal a/w Ms. Neha Paranjape and Mr. Akhilesh Deshmukh for Appellant.
Mr. Akhileshwar Sharma for Respondents.

CORAM : K.R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 7th FEBRUARY 2024

P.C. :

1. Appellant an architect by profession filed, on 28th September 2010, his return of income for the Assessment Year 2010-11 declaring his income as Rs.15,00,23,830/-. The return was accompanied with Computation of Income, Balance Sheet and Profit and Loss Account also. The return of appellant was selected for scrutiny assessment. Appellant realised that while filing his return of income he had declared long term capital gain on sale of property at Bangalore for Rs.8,41,94,374/- after indexation. Whereas it should have been shown as short term capital gain because appellant had claimed depreciation with respect to the said property in earlier assessment years. Appellant therefore filed a letter dated 26th November 2012 providing the working of short term capital gain. Appellant declared that the short term capital gain would be

Rs.11,18,40,291/-. Appellant then filed revised computation of total income declaring the short term capital gain for tax and paid the entire capital gains tax. It is appellant's case that during the assessment proceedings appellant received notice dated 22nd November 2012 under Section 142(1) of the Income Tax Act, 1961 (the Act). Respondent No.1 called upon appellant to show cause as to why the gains on sale of guest house at Bangalore should not be considered to be short term capital gain as depreciation had been claimed in the earlier years. Appellant is candid that it is at that time it came to light that there was an error in treating the gain on sale of the property at Bangalore as long term capital gain.

2. Notwithstanding appellant's explanation as to the error in computation and appellant's explanation that he had not furnished inaccurate particulars of capital gains and the fact that the taxes have been paid treating the gain on sale of the said property as short term capital gain, the Assessing Officer (A.O.) initiated penalty proceedings and imposed penalty under Section 271(1)(c) of the Act, levying a penalty of Rs.3,44,29,216/- for filing inaccurate particulars of income at the rate of 200% of alleged tax sought to be evaded. We have to note that in the order imposing penalty there is no reason given why the penalty should be 200% when the minimum penalty is prescribed at only 100% of tax sought to be evaded.

3. The A.O. has levied penalty only for the reason that assessee revised its computation of income during assessment proceedings and after show cause notice and if the case was not selected for scrutiny assessee could have escaped with his intention of evading tax and therefore assessee has deliberately furnished inaccurate particulars of income. In fact, this is the submissions that Mr. Sharma also made while opposing the appeal.

4. Aggrieved by the order dated 19th July 2013 appellant preferred an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. The CIT(A) by an order dated 19th February 2014 allowed the appeal. Appellant reiterated before the CIT(A) that the error in declaring the gain arising on transfer of guest house at Bangalore was due to a bonafide impression that since appellant had held the asset for more than three years it is a long term capital asset and therefore any gain arising on transfer of long term capital asset will result in long term capital gains with all the benefits attached to it such as indexation and lower tax rate of 20%. It was explained that under this bonafide belief appellant filed the return of income and declared a gain as long term capital gain. It was also submitted that before any show cause notice was served the error was noticed and revised computation of income was filed and the gain was declared as short term capital gain. Appellant also relied on the judgment of the Hon'ble Apex Court in ***Commissioner of Income Tax vs. Reliance Petroproducts Pvt. Ltd.***[1] wherein it has been held

1(2010) 322 ITR 158 (SC)

that mere making of a claim, which is not sustainable in law, will not amount to furnishing of inaccurate particulars of income. The CIT(A) accepted these submissions and allowed the appeal.

5. Against the said order Revenue preferred an appeal before the ITAT and the ITAT by an order pronounced on 16th December 2015 allowed the appeal of the Revenue but reduced the penalty from 200% to 100%. Strangely, the ITAT has not even considered the judgment of the Hon'ble Apex Court in *Reliance Petroproducts Pvt. Ltd.* (supra).

6. It is against this order of the ITAT pronounced on 16th December 2015 this appeal has been preferred by assessee. The appeal was admitted on 29th January 2020 and the following three substantial questions of law were framed.

QUESTIONS OF LAW

> *(i) Whether the Tribunal is correct in law in reversing the order passed by the CIT(A) and thereby confirming the levy of concealment penalty?*
>
> *(ii) Whether the Tribunal is correct in law in upholding the action of respondent No.1 in levying concealment penalty under Section 271(1)(c) of the Income Tax Act, 1961 on the addition made on account of mistake in treating the income from transfer of depreciable asset as long term capital gain instead of short term capital gain as per provisions of Section 50 of the Act?*
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> *(iii) Whether the Tribunal is correct in law confirming the levy of penalty under Section 271(1)(c) of the Act without appreciating that appellant has neither concealed any particulars of income nor furnished any inaccurate particulars of income?*

7. In our view all these three questions can be answered together.

Section 271(1)(c) of the Act reads as under :

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(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or

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8. As held by the Hon'ble Apex Court in *Reliance Petroproducts Pvt. Ltd.* (supra), in order to be covered under this provision, there has to be concealment of the particulars of income of assessee or assessee must have furnished inaccurate particulars of his income. It is not Revenue's case that there was any concealment of income. The entire basis is that by initially filing the return of income showing gain made from the sale of the property at Bangalore as long term capital gain, assessee has furnished inaccurate particulars of income. Admittedly, 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. Submitting an incorrect claim in law of long term capital gain would not tantamount to furnishing inaccurate particulars. We should also note that the assessment order itself was passed after assessee furnished its revised computation of income. A mere making of a claim which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding income of assessee. Such claim made in the returns cannot amount to inaccurate particulars. We find support for this view in *Reliance Petroproducts Pvt. Ltd.* (supra) where Paragraph Nos. 8 to 12 read as under :

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8. 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 v. 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 v. Dharamendra Textile Processors [2008] 13 SCC 369 as also, the decision in Union of India v. Rajasthan Spg. & Wvg. Mills [2009] 13 SCC 448 and reiterated in para 13 that:-

> *"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 v. 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 v. Joint CIT was upset. In Union of India v. 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 enactment of Section 271(1)(c) read with Explanations indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, willful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under Section 276-C of the Act. The basic reason why decision in Dilip N. Shroff v. Joint CIT was overruled by this court in Union of India v. Dharamendra Textile Processors was that according to this court the effect and difference between Section 271(1)(c) and Section 276-C of the Act was lost sight of in case of Dilip N. Shroff v. Joint CIT. However, it must be pointed out that in Union of India v. Dharmendra Textile Processors, no fault was found with the reasoning in the decision in Dilip N. Shroff v. Joint CIT, where the court explained the meaning of the terms "conceal" and inaccurate". It was only the ultimate inference in Dilip N. Shroff v. 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 v. Joint CIT was overruled.*

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

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

11. We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars.

12. It was tried to be suggested that Section 14A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form the part of the total income. It was, therefore, reiterated before us that the Assessing Officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which

> *claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature.*

9. The sum and substance of assessee's case is that assessee had neither concealed any income nor furnished any incorrect particulars of such income. Admittedly, assessee had shown correct sale consideration of the property and also shown correct cause of depreciation in the return of income, so no income as such has been concealed. The only thing that assessee did was claiming a particular income (Capital Gain) under different head namely under long term capital gains as against short term capital gains. Assessee claims that it was done under bonafide belief that the asset was a long term asset as it was held for more than three years. Just because assessee was a director in some companies cannot be a reason to state that claiming this short term capital gain as long term capital gain was to avoid payment of any tax. In any event as noted earlier the entire short term capital gain was paid even before the assessment order was passed. A mere making of claim, which is not sustainable in law, by itself, will not amount to furnishing incorrect particulars regarding the income of assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars as held by the Hon'ble Apex Court in *Reliance Petroproducts Pvt. Ltd.* (supra).

10. In the circumstances, in our view, the tribunal was not correct in interfering with the order passed by the CIT(A). All questions are answered accordingly in the facts and circumstances of the present case.

11. Appeal allowed. No order as to costs.

(DR. NEELA GOKHALE, J.) **(K.R. SHRIRAM, J.)**