

OD-10

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
(INCOME TAX)
ORIGINAL SIDE

ITAT/21/2025
IA NO:GA/1/2025

PRINCIPAL COMMISSIONER OF INCOME TAX 5, KOLKATA
VS.
RAM AWATAR DHOOT

BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE JUSTICE CHAITALI CHATTERJEE (DAS)
Dated : 7th March, 2025.

Appearance:

Mr. Tilak Mitra, Adv.
Mr. Amit Sharma, Adv.
..for Appellant

Mr. Sutirtha Das, Adv.
..for respondent

THE COURT : This appeal by the Revenue filed under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 29th August, 2024 passed by the Income Tax Appellate Tribunal, "B" Bench, Kolkata in ITA No.51/Kol/2011, for the assessment year 2015-16.

The Revenue has raised the following substantial questions of law for consideration:

"(i) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was justified in deleting the penalty of Rs. 4,61,771/- u/s.

271(1)(c) imposed by the A.O. on the addition of unexplained cash credit u/s. 68 to the tune of Rs. 14,94,407/- on sale of shares of penny stock M/s. Sulabha Engineering Ltd. falsely claimed by the assessee as Long-Term Capital Gains exempt u/s. 10(38) of the IT Act, 1961 ?

ii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was justified in holding that stricter proof of culpability is missing in this case when the AO had clearly established in the assessment order that the assessee had shown bogus LTCG from sale of scrips of an identified Penny Stock and claiming it as exempt with the objective of evading taxes ?

iii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was justified in allowing the appeal of the assessee by deleting the penalty imposed by the A.O. vide order u/s. 271(1)(c) dated 25/01/2023 even though the Hon'ble High Court at Calcutta vide order dated 16.06.2022 in ITAT No. 20/2022 was pleased to uphold the quantum addition in favour of the Department ?

iv) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT erred in law and on facts by deleting the penalty imposed by the A.O. amounting to Rs. 4,61,771/- vide order u/s. 271(1)(c) dated 25/01/2025 even though the decision of the Hon'ble Jurisdictional High Court in the lead case of Pr. CIT –vs.- Smt. Swati Bajaj squarely covers the issue of bogus Long Term Capital Gain from sale of penny stocks and also

covered by exceptions laid in respect of Circular No. 5 of 2024 dated 15.03.2024 issued by the CBDT vide F. No. 279/Misc. 142/2007-ITJ (Pt.) dated March 15, 2024 ?”

We have heard Mr. Tilak Mitra, learned standing counsel, assisted by Mr. Amit Sharma, learned Advocate appearing for the appellant/revenue and Mr. Sutirtha Das, learned Advocate appearing for the respondent/assessee.

The undisputed fact is that the addition made by the Assessing Officer on the assessee under Section 68 of the Act was affirmed by this Court by judgment dated 8th July, 2022 in a batch of cases namely, PCIT vs. Swati Bajaj and Others, 2022 SCC Online Cal. 1572. The present proceedings arise out of penalty proceedings initiated under Section 271(1)(c) of the Act to the tune of Rs.4,61,771/-. Learned Tribunal in the impugned order noted that the addition made by the Assessing Officer on the ground of bogus claim of long term capital gain was affirmed by this court, observed that the penalty proceedings being a different proceeding than the matter concerning quantum addition during the assessment proceedings, the penal provisions of levy of penalty under Section 271(1)(c), the stricture yardstick of culpability is required to be established. After making such an observation, the learned Tribunal proceeded to hold that considering the overall facts and circumstances of the case and also considering that the assessee had claimed a small amount of long term capital gain and that the possibility that the assessee might be a bona fide

beneficiary of a long term capital gain cannot be ruled out, gave the benefit of doubt to the assessee and deleted the penalty.

The learned senior counsel for the appellant/revenue pointed out that certain observations made by the learned Tribunal in paragraph 6 seeks to give an impression as if the learned Tribunal was sitting in appeal over the decision in the case of Swati Bajaj. Though we also had such an impression on going through paragraph 6 of the impugned order, all that is required to be clarified is that the learned Tribunal cannot do so in a proceeding which has come up in appeal before it which arises out of a penalty proceeding under Section 271(1)(c) of the Act. Therefore, even if the Revenue is of the opinion that the observations give such an impression, it needs to be clarified that the learned Tribunal cannot do so and such impression need not be drawn from the observations made in paragraph 6 of the impugned order.

The learned Tribunal while granting relief to the assessee, made an observation that for levying penalty under Section 271(1)(c) of the Act, stricter yardstick of culpability is required to be established. This finding, in our view, is not legally sustainable. We support our conclusion by placing reliance on the decision of the Hon'ble Supreme Court in *Union of India & Ors. vs. Dharamendra Textile Processors & Others*, (2008) 13 SCC 369. The question which falls for consideration before the larger Bench in a batch of appeals was, whether Section 11-AC of the Central Excise Act, 1944 with the intention of imposing mandatory penalty on the persons who evaded payment of tax should

be read to condone mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed medium. The assessee in the said case referred to Section 271(1)(c) of the Income Tax Act and took a stand that Section 11-AC of the Central Excise Act is identical and in a given case it was open to the Assessing Officer not to impose penalty. The Hon'ble Supreme Court had taken note of the statutory provisions namely, Section 271(1)(c) and Section 276-C referred to the decisions in *Chairman, SEBI vs. Shriram Mutual Fund & Another*, (2006) 5 SCC 361, *Director of Enforcement vs. MCTM Corporation (P) Ltd.* (1996) 2 SCC 471, *Gujarat Travancore Agency vs. CIT*, (1989) 3 SCC 52 and held that the explanations appended to Section 271(1)(c) of the Income Tax Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. It was further held that the judgment in *Dilip N. Shroff vs. CIT*, (2007) 6 SCC 329, has not considered the effect and relevance of Section 276-C of the Income Tax. It was further pointed out that the object behind the enactment of Section 271(1)(c) read with explanations indicates that the said Section has been enacted to provide for a remedy for loss of revenue. The penalty under the proceedings is a civil liability and willful concealment is not an essential ingredient for attracting civil liability as in the matter of prosecution under Section 276-C of the Income Tax Act.

Accordingly, it was held that the decision in Dilip N. Shroff's case was not correctly decided but SEBI's case has analyzed the legal position in the

correct perspective. In the light of the decision in *Dharamendra Textile Processors*, the observations made by the learned Tribunal which appears to suggest that the culpability has to be established does not lay down the correct legal principle. In other words, the Tribunal cannot hold that wilful concealment/culpability is required to be established, which is not required to be done as the same is a civil liability as explained in *Dharamendra Textile Processors [supra]*.

Therefore, we are inclined to set aside that portion of the order passed by the learned Tribunal while interpreting the provisions of section 271(1)(c) of the Act as it is not in consonance with the decision of the Hon'ble Supreme Court in *Dharamendra Textile Processors*.

As rightly pointed out by the learned senior standing counsel for the revenue, various provisions of the Act which fall in Chapter XXII of the Income Tax Act stand in a different pedestal as the said Chapter deals with offence and prosecution, by way of illustration if we refer to section 278-A, in such offences, under the said provision it requires a palpable mental state on the part of the accused whereas section 271(1)(c) falls in Chapter XXI which deals with penalty is imposable. This is one more distinction which has been drawn in the Act itself which is of utmost relevance.

With regard to the penalty which has been imposed on the assessee, considering that the penalty is less than Rs.5 lakhs and the assessee being an individual, we do not propose to interfere with the relief granted by the learned

Tribunal to the assessee by deleting the penalty. Therefore, to that extent the order is affirmed.

Accordingly, the appeal is partly allowed and the substantial questions of law are answered in favour of the revenue.

The stay application, IA NO:GA/1/2025, is disposed of.

(T.S. SIVAGNANAM, CJ.)

(CHAITALI CHATTERJEE (DAS), J.)

Sm/SN/Pkd/S.Das