



Reportable

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

ITR No. 243/1991

Date of Decision: August 4, 2010

The Commissioner of Income Tax

....Appellant

Through

Ms. Prem Lata Bansal,
Advocate

Versus

M/s Harparshad & Company Ltd.

....Respondent

Through

None

CORAM :-

**HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL**

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (Oral)

1. Nobody appeared on behalf of the assessee inspite of service. Even today, there is no appearance. In these circumstances, we have no option but to proceed with the matter in the absence of the assessee. We have heard Mrs. Prem Lata Bansal, Advocate for the revenue at length.

2. The Assessing Officer, in the proceedings initiated by him under Section 271 (1) (c) of the Income Tax Act has imposed



in respect of assessment year 1979-1980. The CIT (Appeal) has affirmed this penalty. However, Income Tax Appellate Tribunal has set-aside the penalty order. The Revenue has approached this Court by moving petition under Section 256 (2) of the Act seeking reference, which petition was allowed vide order dated 07.01.1991 and direction was given to the Tribunal to draw a statement of case and refer the following question of law for the opinion of this Court:-

“Whether the Tribunal was correct in law in deleting the penalty imposed by the Income-tax Officer under section 271 (1) (c) of the Income-tax Act, 1961?”

3. This question arises in the following factual backdrop. While passing the assessment order, the Assessing Officer was of the view that the aforesaid claim of payment of commission of Mrs. Ritu Nanda was bogus and could not be substantiated by the assessee even when the opportunity in this behalf was given to it. Therefore, the Assessing Officer chose to serve show cause notice upon the assessee under Section 271(1) (c) of the Act for imposition of penalty. After eliciting the reply of the assessee to the said show cause notice and given hearing, order dated 15.07.1985 was passed by the Assessing Officer thereby imposing penalty in the sum of Rs.1,05,730/- . The assessee has approached the CIT (Appeal) challenging the order of penalty, but unsuccessfully, as the appeal was dismissed on 05.03.1986. In further appeal to the ITAT, however, the assessee succeeded as



11.02.1988. Before we take note of the considerations which were weighed with the Assessing Officer and the CIT (A) on the one hand in imposing the penalty and the ITAT on the other hand in deleting the said penalty, it would be in fitness of things to deal with the claim for commission preferred by the assessee in the return of income filed by it and the reasons because of which the said claim was disallowed.

4. We have already taken note of the reasons given by the Assessing Officer in disallowing the claim. To recapitulate in brief, the Assessing Officer found that no services were rendered by Mrs. Ritu Nanda as alleged for which she was purportedly given commission @ 3% of the contract value. Further more, though the payment of commission was claimed as given to Mrs. Ritu Nanda as Director of the Company, at the relevant time when this contract from Iran was signed by the assessee, she was not even the Director. In the appeal filed by the assessee, CIT had disallowed part of the commission. Total commission which was claimed to have been paid to Mrs. Ritu Nanda was in the sum of Rs.2,74,617/- and the entire amount was disallowed by the AO. However, CIT (Appeal) disallowed the payment of commission to the extent of Rs.1,83,978/-. Order of CIT (Appeal) in these quantum proceedings has been perused by us. Reading thereof would bring out certain additional facts which are as under:-

5. Amount of Rs.2,74,617/- which was paid to Mrs. Ritu Nanda as commission represented 3% of the contract value. Mrs. Ritu



Jupiter Trading Corporation. It was found that, in fact, it was M/s Jupiter Trading Corporation which had rendered the requisite services. Instead of paying the commission to M/s Jupiter Trading Corporation directly, the assessee had paid 3% of the contract value as commission to Mrs. Ritu Nanda, who out of this commission paid 1% thereof to M/s Jupiter Trading Corporation. It is for this reason that for the 1% commission which was paid to M/s Jupiter Trading Corporation against the services actually rendered, the CIT (Appeal) had allowed the deduction. Otherwise, in so far as payment made to Mrs. Ritu Nanda is concerned specific and categorical finding of the CIT (Appeal) was that she had not rendered any services for which commission was paid to her. It would be of interest to note that the Income Tax Appellate Tribunal also put its stamp of approval to the aforesaid findings. The relevant portion of the ITAT order reads as under:-

“In fact no services has been rendered by Smt. Ritu Nanda and that expenditure by the way of commission leaving apart that portion which had been paid to M/s Jupiter Trading Corpn., was not incurred for the purposes of business.”.

6. It was also observed that the payment was made to Smt. Ritu Nanda who was daughter-in-law of the Managing Director of the Company and, thus, it was a bogus payment without any consideration.

7. We have examined the penalty proceedings keeping in view the aforesaid aspects in mind and we are of the opinion that the



blemish and there was no cause for interference in it by the Tribunal. The reasons given by the Tribunal in quashing these penalty proceedings are totally irrelevant, not germane to the issue and rather the Tribunal has lost sight of the aforesaid aspects, which had been conclusively established in the quantum proceedings. In the first instance, the Tribunal has observed that when part claim was allowed by the CIT (Appeal) and only part claim was disallowed, claim for commission was not bogus but was only excessive. This is an observation which is contrary to record. The Tribunal has failed to take note of the fact that part claim as commission was allowed to the assessee not because of the reason that Mrs. Ritu Nanda had rendered any services. It was because of the fact that M/s Jupiter Trading Corporation had rendered services for which it was paid 1% of the commission by Mrs. Ritu Nanda out of 3% received by her. However, the penalty was imposed for putting a bogus claim of payment of commission purportedly paid to Mrs. Ritu Nanda. As far as commission to her is concerned, it was accepted by the ITAT in quantum proceedings that she did not render any services at all.

8. The second reason given by the Tribunal, which flows from the first, is that it was not for the Assessing Officer to substitute its own wisdom or business sense with that of the assessee and in case assessee chose to give excessive commission to Mrs. Ritu Nanda, that would call for penalty. Again, while making these observations, the Tribunal was swayed by the wrong fact that Mrs.



but excessive. The findings given in assessment proceedings are relevant and have probative value. Where the assessee produces no fresh evidence or presents any additional or fresh circumstance in penalty proceedings, he would be deemed to have failed to discharge the onus placed on him and the levy of penalty could be justified (**CIT Vs. M. Habibulla** 136 ITR 760 (AU)). Explanation (1) below section 271 (1) (c) suggests that the assessee would be deemed to have failed to furnish full and accurate particulars of income, if it failed to offer an explanation, or offers the explanation, which is found by the ITO to be false or it has not been able to substantiate it, in respect of any facts material to the computation to the total income of that person under Income-tax Act. The assessee had failed to offer any explanation in respect of the addition of Rs.1,83,078/-, and it could be deemed to have concealed the particulars of income or furnished inaccurate particulars thereof, by virtue of this explanation.

9. In **CIT Vs. Escorts Finance Ltd.** 226 CTR (Del) 105, principle of law was resettled in the following words:-

“It is repeatedly held by the Courts that the penalty on the ground of concealment of particulars of non-disclosure of full particulars can be levied only when in the accounts/ return an item has been suppressed dishonestly or the item has been claimed fraudulently or a bogus claim has been made. When the facts are clearly disclosed in the return of income, penalty cannot be levied and merely because an amount is not allowed or taxed to income as it cannot be said that the assessee had filed inaccurate particulars or concealed any income chargeable to tax. Further, conscious concealment is necessary. Even if some deduction or benefit is claimed by



malafide can be attributed, the penalty would not be levied. A fortiori, if there is a deliberate concealment and false/inaccurate return was filed, which was revised after the assessee was exposed of the falsehood, it would be treated as concealment of income in the original return and would attract penalty even if revised return was filed before the assessment is completed. Likewise, where claim made in the return appears to be ex facie bogus, it would be treated as case of concealment or inaccurate particulars and penalty proceedings would be justified”

10. The law has developed to the extent that even if there is no concealment of income or furnishing of inaccurate particulars, but on the basis thereof the claim which is made is ex facie bogus, it may still attract penalty provision. Cases of bogus hundi loans or bogus sales or purchases have been treated as that of concealment or inaccuracy in particulars of income by the judicial pronouncements.(See Krishna Vs. CIT, 217 ITR 645, Rajaram Vs. CIT, 193 ITR 614 and Beena Metals 240 ITR 222).

11. Immediately thereafter, in **Commissioner of Income Tax Vs. Vidyagauri Natverlal and Ors.** 238 ITR 91, Gujarat High Court made a distinction between wrong claim as opposed to false claim and held that if the claim is found to be false, the same would attract penalty. We may also take note of the following observations of the Supreme Court in the case of **Union of India and Ors. Vs. Dharmendra Textile Processors and Ors.** (2008) 13 SCC 369, 306 ITR 277 (SC).

12. The explanations appended to Section 272 (1) (c) of the IT Act entirely indicates the element of strict liability on the assessee



return. The judgment in Dilip N. Shroof's case (supra) has n considered the effect and relevance of Section 276C of the I.T.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 provisions is a civil liability. Willful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the I.T. Act.

13. Thus, we answer the question as formulated in the negative that is against the assessee and in favour of the Revenue.

**(A.K. SIKRI)
JUDGE**

**(REVA KHETRAPAL)
JUDGE**

**AUGUST 04, 2010
Rs**