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

\+ ITA 321/2010

COMMISSIONER OF INCOME TAX ..... Appellant
Through Ms. Sonia Mathur, Advocate

versus

M/S. SHYAM TEX INTERNATIONAL LTD. ..... Respondent
Through Mr. O.P. Sapra, Advocate

% Date of Decision : 6th August, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

MANMOHAN, J

1. The present appeal has been filed under Section 260A of Income Tax Act, 1961 (for brevity "Act, 1961") challenging the order dated 17th April, 2009 passed by the Income Tax Appellate Tribunal (in short "ITAT") in ITA No. 3607/Del/2008 for the Assessment Year 2005-2006.

2. Ms. Sonia Mathur, learned counsel for Revenue submitted that the ITAT had failed to appreciate that the respondent-assessee had

reduce its statutory liability. According to her, the respondent-asses had not made sufficient disclosure to justify deletion of penalty of Rs. 16,10,000/- under Section 271(1)(c) of Act, 1961.

3. She lastly submitted that making a provision for encashment of leave amounted to furnishing of inaccurate particulars regarding the income of the respondent-assessee. In this connection, she relied upon a judgment of the Supreme Court in ***Union of India (UOI) and Ors. Vs. Dharamendra Textile Processors and Ors.*** reported in ***(2008) 306 ITR 277 (SC)***.

4. Upon a perusal of the impugned order, we find that the respondent-assessee had made full disclosure in the income tax return about the method of accounting employed for the subsidies. Moreover, the assessee's provision for encashment of leave, *per se* cannot be said to be mala fide. In fact, ITAT in the impugned order has observed as under :-

> *"3. We have considered the facts of the case and rival submissions. On the basis of the audit report in form no.3CD, it is clear that the assessee had made a disclosure that it was following cash method in so far as grants and subsidies are concerned. This method may not be permissible in the case of a company. At the same time, this method may not be appropriate in view of the fact that the assessee had to follow either cash or mercantile system of accounting and a hybrid system is not permissible. Nonetheless, the fact remains that the disclosure has been made in the return of income about the method in which the receipts in respect of subsidies were accounted for. When questioned as to whether the amount accrued but not received had been disclosed, it was submitted by the learned counsel that since the receipt hinges upon satisfaction of a number of conditions, there could have been no ascertainment of amount as in such a case it would amount to accrual of income. Therefore, the facts are that while method of accounting was disclosed, the amount liable to be taxed on mercantile system of accounting*

The learned DR had relied on the decision of Hon'ble Supreme Court in the case of CIT vs. Gates Foam & Rubber Company (1973) 91 ITR 467, in which it was held that to rebut the charge of furnishing inaccurate particulars of income under the fiction created by the Explanation to section 271(1)(c), the assessee has to show that his failiure to file the correct return of income did not arise from any fraud or willful neglect on its part. That was a case where a large portion of the income was diverted by making credits to the account of an agent, which was a bogus concern set up for this purpose. We find that the facts of that case and this case are distinguishable because it is not a case of diversion of income. Further, the assessee had made a disclosure in form 3CD, which may not have been accepted in assessment proceedings and addition in respect of which might have become final, but there was no diversion of income or there was no suppression of facts. The learned DR had also relied on the decision of Hon'ble Supreme Court in the case of Union of India and Others vs. Dharmendra Textile Processors & Others (2008) 306 ITR 277, in which it was held that the Explanation appended to section 271(1)(c) indicate the element of strict liability on the assessee while filing the return in respect of the concealment of income or furnishing inaccurate particulars of income. This aspect was not taken into account in the case of Dilip N. Shroff (2007) 8 SCALE 304. The Explanation were appended as a matter of remedy for loss of revenue. Therefore, the penalty was a civil liability and accordingly willful concealment was not an essential ingredient for attracting the penalty as is the case in respect of prosecution u/s 276C of the Act. In our view, this judgment holds that the issue of penalty has to be decided in terms of provisions contained in the Explanation to section 271(1)(c). Explanation-1 is applicable to the facts of the case and the assessee has furnished an explanation to the notice issued by the AO. The fact regarding accounting of subsidy on cash basis was disclosed in the return of income. The balance accrued portion of the subsidy was not included as in the perception of the assessee it was not reasonably certain whether the amount would be received or not. In our view, such a perception was not wholly unjustified and, thus, it cannot be said that the explanation was not bona fide. The learned DR had also relied on the decision of Punjab & Haryana High Court in the case of CIT vs. Lal Chand Tirath Ram (1997) 225 ITR 675. In that case, the AO noticed the difference between the stock shown in the books of account and stock kept in the warehouse. The explanation of the assessee was that some stock belonged to a third party who was a truck driver. No evidence could be produced to show that the truck driver owned agricultural land or cultivated it. In these circumstances, the explanation tendered by the assessee was held to be not substantiated by cogent and reliable evidence. Thus, the levy of penalty was upheld. We

are of the view that the facts of that case and this case are also distinguishable for the simply reason that the assessee had made disclosure in the return of income about the method of accounting employed for the subsidies. Under such circumstances, the explanation cannot be held to be unsubstantiated.

3.1. In regard to the provision for encashment of leave, the learned counsel relied on the decision of Hon'ble Supreme Court in the case of Apollo Tyres Ltd. Vs. CIT (2002) 255 ITR 273, in which it was held that the accounts drawn in accordance with parts II and III, Schedule VI of the Companies Act, certified by the Chartered Accountant, passed in the general body meeting and submitted to the Registrar of Companies could not be reopened by the AO for the purpose of computing the book profits. On the other hand, the case of the learned DR was that the claim was not based on any certificate from the Actuary. As mentioned earlier, we are not on the issue of deciding the merits of the addition. The question before us is whether the explanation of the assessee is bona fide. A provision made on a reasonable basis in respect of liability which has been incurred by the assessee, a deduction has to be allowed, as held by Hon'ble Supreme Court in the case of Bharat Earth Movers Ltd. There is nothing on the record to show that the assessee was not liable to make payment in respect of unavailed earned leave. There may be a dispute about the quantum of the liability, which has been settled in the quantum appeal. However, it cannot be said that the claim per se was not bona fide.

3.2 Thus, we are of the view that the assessee has furnished reasonable explanation in respect of both the items, which meets the requirement of the provision contained in Explanation-1 to section 271(1)(c) of the Act. In view thereof, the levy of penalty is deleted.

4. In the result, the appeal is allowed."

5. In our opinion, the Supreme Court in ***Dharamendra Textile Processors and Ors.*** (supra) has only held that mens rea is not essential for imposing penalty for breach of civil obligations. However, it has not been stipulated by the Apex Court that by merely making a claim, which is not sustainable in law by itself, will amount to furnishing of inaccurate particulars within the meaning of 271(1)(C) of Act, 1961.

6. In fact, recently the Supreme Court in ***Commissioner of Inco Tax v. Reliance Petroproducts Pvt. Ltd., (2010) 322 ITR 158 (SC)*** has observed as under :-

> *"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 the 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 276C of*

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 276C of the Act was lost sight of in the case of Dilip N. Shroff v. Joint CIT. However, it must be pointed out that in Union of India v. Dharamendra 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 the Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature."

7. Accordingly, present appeal, being devoid of merit, is dismissed *in limine*.

MANMOHAN, J

CHIEF JUSTICE

AUGUST 6, 2010
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