



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

+ **ITA No. 622/2008**

% Judgment reserved on : 19.05.2011
Judgment delivered on : 03.06.2011

ASTRA HOUSING & INVESTMENT P. LTD **... APPELLANT**

Through: Mr. O.S. Bajpai, Sr. Advocate
with Mr. V.N. Jha, Advocate

Versus

COMMISSIONER OF INCOME TAX **... RESPONDENT**

Through: Ms. Anshul Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE M.L.MEHTA

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

M.L. MEHTA, J.

1. This appeal under Section 260A of the Income Tax Act, (for short 'the Act') is filed by the assessee against the order of the Income Tax Appellate Tribunal (for short 'the Tribunal'). dated 25th January, 2008, whereby the Tribunal set aside the order of the CIT(A) deleting the penalty of Rs.10,01,684/-,



levied by the Assessing Officer. This appeal is admitted on the following substantial question of law:-

“Whether on the facts and circumstances of the case the Tribunal was justified in reversing the order of the CIT(A) who deleted the penalty of Rs.10,01,684/- under Section 271(1)(c) of the Act?”

2. We propose to dispose of this appeal and for its disposal, the facts need to be narrated for proper understanding of the issue involved.

3. A search and seizure operation was conducted at the premises of the appellant/Shri Rajiv Bhatia, Director of the assessee company and certain documents were seized, including annexures A-2, A-3 and A-10. Notice under Section 158BC of the Act for the block period i.e., assessment year 1991-1992 to 2001-02 was issued against the assessee company which filed its block return. Assessing Officer completed the assessment under Section 158 BC and *inter alia* made addition of Rs.14,77,410/- for the following reasons. A total of annexures A-2 was Rs.28,76,071/- and that of A-3 Rs.22,73,571/-. A total of both these make it to Rs.51,49,642/-. As against this amount, entries relating to claim of the assessee for a sum of Rs.30,69,868/-, being repeat/duplicate, was accepted and thereby making a balance



of Rs.20,79,773.50 against annexures A-2 and A-3. In this regard, the assessee also stated that a sum of Rs.9,59,941/- was already found recorded in the books of account of the assessee, which was accepted by the Assessing Officer. Thus, the amount of Rs.11,19,832.50 (2079773 – 959941) was taken as remaining unexplained by the assessee. In this regard, explanation was also given by the assessee that this was spent by the Director of the assessee company, Mr.Rajiv Bhatia from company's imprest account of Rs.25 lakhs. This explanation was not accepted by the Assessing Officer and thus he made addition relevant to annexures A-2 and A-3 to the tune of Rs.11,19,832.50. With regard to the entries in annexure A-10 amounting to Rs.11,10,709/-, entries to the tune of Rs.1,61,889/- were stated to be recorded twice. After deduction of this, an amount of Rs.9,48,820/- (Rs.11,10,709/- Rs.1,61,889/-) remained to be explained by the assessee. In this regard, assessee explained that a sum of Rs.5,91,243/- was already found recorded in the books of account and this explanation was accepted by the Assessing Officer, thereby leaving a sum of Rs.3,57,577/- (948820 – 591243) to be explained by the assessee. In this regard also, the assessee stated that the said sum was spent by the Director of the assessee from and out of the imprest account of Rs.25 lakhs,



which the company had given him for the purpose of incurring expenditure on behalf of the company. This was also not accepted by the Assessing Officer. Consequently, Assessing Officer made addition to the tune of Rs.14,77,409 (11,19,832 + 3,57,577) on the ground that these expenses are not recorded in the books of accounts viz-a-viz documents marked annexures A-2, A-3 and A-10.

4. The assessee preferred appeal against the order of the Assessing Officer, before the CIT(A), who upheld the additions made by the Assessing Officer, and disbelieved the plea of the assessee that its Director, Rajeev Bhatia spent the sum recorded in the above mentioned three annexures from the imprest amount on behalf of the assessee. It was observed that said expenditure was not debited even till 1st April, 2001 in the imprest account of Mr. Rajiv Bhatia in the books of account maintained by the assessee. The entries in this regard were made only in September, 2001 i.e., much after the date of search which took place on 4th April, 2000. While upholding the additions made by the Assessing Officer, the CIT(A) vide order dated 29th August, 2003 observed as under:-

“6.4 I have considered the issue carefully. During the search operation



the Director of the appellant company, Shri Rajeev Bhatia has submitted that a sum of Rs.15 to 20 lakhs have been spent on the construction of the Golden Tulip Tourist Resort outside the account books. This evidence which is spontaneous expression of truth carries much weightage. The theory of imprest account appears to be clearly an after-thought. There was nothing to prevent Shri Bhatia from stating the truth in case he was withdrawing certain amount in his imprest account and later on spending the same on the construction. The addition of Rs.11,19,832/- and Rs.3,57,577/- are therefore confirmed.”

5. Both, i.e., assessee as also the Revenue, being aggrieved by the order of the CIT(A), filed their respective appeals before the Tribunal, on various issues including addition of Rs.1477410/-. The Tribunal vide its order dated 16th September, 2005 disposed of both the appeals together and thereby deleted all the additions excepting the addition of Rs.1477410. In this regard the Tribunal reasoned as under :

“We shall first explain as to what an Imprest account is. It is an adhoc sum entrusted to someone with authority to spend for purposes authorised by the person giving the fraud. It is a matter of convenience that the person to whom such a fund is given is not handicapped by non-availability of funds even for routine or small expenditure. The persons to whom such fund is given has to account for the expenses to the person who had given the money. As is clear from the facts, the entries regarding the spending of money by the Director from and out of the imprest account were not entered in the books of account of the assessee. The expenditure in



question as reflected in the loose sheets was for the period from 1.4.97 till 31.3.2000. One would expect the Director to give an account of the fund for at least for a financial year prior to the closing of the books of accounts for the financial year. The non-furnishing of the details of expenditure for more than two years cannot be accepted as a mistake or even inadvertence. Prior to the date of search these expenditure were not recorded in the books of account of the assessee. It is only the entries in books of account which are contemporaneous with the happening of a transaction that is considered having evidentiary value. The recording of transactions after the search cannot validate the plea of the assessee. Admittedly the due date for filing the return of income for A.Ys. 97-98, 98-99 had expired prior to the date of search. The entries in question were recorded in the books of account only in September, 2001. The imprest account in the name of the Director appeared at the same figure of Rs.25 lacs from 1.4.98 till September, 2001, when the expenditures were recorded therein. In such circumstances, the plea of the revenue that the imprest account was an after thought is correct. The plea put forth by the assessee has not been substantiated. Admittedly the expenditures in question were incurred on behalf of the assessee. The same are, therefore, to be considered as undisclosed income. In our view, the revenue authorities were fully justified in making the aforesaid addition and their orders on this issue does not call for any interference. The same is confirmed and grounds 4 to 4.3 and 5 are dismissed.”

6. After the above order dated 16th September, 2005 of the Tribunal in quantum proceedings, the Assessing Officer gave specific opportunity to the assessee in response to which written explanation dated 17th March, 2006 was filed, wherein the submissions made in the assessment proceedings were reiterated in the sense that no extra cash was found by the search party; imprest amount was given to the Director, which



was spent by him; and the fact that addition had been made in the quantum proceedings, could not be a reason to levy penalty. The Assessing Officer rejected the pleas of the assessee and maintained the penalty. Against this, matter was carried in appeal before the CIT(A), wherein specific plea was taken with respect to the non-recording of satisfaction in the block assessment order regarding levy of penalty and it was contended that in the absence of such satisfaction, the penalty proceedings were bad.

7. The CIT(A) recorded the finding that satisfaction, as required in Section 27(1)(c), is not envisaged in Section 158BFA(2). While recording findings against the assessee in this regard, the CIT(A), on merits held that the Assessing Officer was not justified in levying penalty merely on the ground that additions have been upheld by the ITAT. The Revenue, being aggrieved of the final outcome of the order of the CIT(A), preferred appeal before the Tribunal. Assessee brought the additional fact on record that the income tax authorities have accepted set off with regard to the expenditure in the assessment year 2004-05. In support thereof, assessment order for the financial year 2003-04 was also furnished. While entertaining this plea, the Tribunal held that this also does not



give any support to the contention of the assessee that the explanation of the assessee in any way was correct. The acceptance by the Department to set off the expenditure against the imprest account in assessment year 2003-04, cannot validate the explanation of the assessee, as it was a later act of the assessee after the conduct of search. It was noted that in the imprest account, the Director did not furnish the details of expenditure for about two years which cannot be held to be mistake on the part of assessee. The Tribunal examined the imprest account of the Director, wherein a sum of Rs.25 lakhs was shown to have been given to him on different dates. In this backdrop, the Tribunal concurred with the view of the AO that the explanation of the assessee that imprest money of Rs.25 lakhs was utilized for making the expenditure, recorded in the seized documents, cannot be accepted as correct.

8. The Tribunal finally reversed the finding of the CIT(A) and recorded as under:

“13. Moreover, the addition in the present case has been made on the basis of documentary evidence which was found from the possession of the Director of the assessee company and it was admittedly belonged to the assessee company. The addition is quantified addition. The amount of expenditure incurred by the



assessee mentioned in the seized documents was certainly undisclosed income of the assessee which has been assessed by the AO and the addition on which has been upheld by ITAT in the quantum proceedings. The explanation given by the assessee was found to be incorrect. In this view of the situation, it is held that the Id. CIT(A) has erred in deleting the penalty which was rightly levied by the Assessing Officer. The order of CIT(A) is set aside and that of AO is restored.”

9. It is against this impugned order of the Tribunal that the assessee is before us in appeal in ITA No. 622/2008.

10. The order of the Tribunal with regard to penalty as levied by the Assessing Officer, has been assailed by the learned counsel for the assessee, mainly on the ground that in the given facts and circumstances, it could not be said to be a case of concealment of income or furnishing of inaccurate particulars by the assessee. He also submitted that the primary burden of proof was on the Revenue and that satisfaction was required to be recorded by the Assessing Officer in this regard before proceedings to levy any penalty under Section 27(1)(c). Learned counsel relied upon various judgments in support of his submissions. A reference can be made to those, viz., ***Dilip N. Shroff v. JCIT***, (2007) 291 ITR 519 (SC); ***Union of India v. Dharamendra Textile Processors***, (2008) 306 ITR 277 (SC); ***CIT v. Reliance***



Petroproducts Pvt. Ltd., (2010) 322 ITR 158 (SC); ***CIT v. Haryana Warehousing Corporation***, (2009) 314 ITR 215 (P&H); ***CIT v. Sidhartha Enterprises***, (2010) 322 ITR 80 (P&H); ***Ms. Madhushree Gupta v. Union of India***, (2009) 317 ITR 107 (Delhi), ***CIT v. Nath Bros. Exim International Ltd.***, (2007) 288 ITR 670 (Delhi) and ***CIT v. Bacardi Martini India Ltd.***, (2007) 288 ITR 585 (Delhi).

11. The crux of the ratio of above decisions is that a mere omission or negligence would not constitute a deliberate act of *suppressio veri* or *suggestio falsi*. In order to be covered within the proviso of clause (c) of sub-Section (1) of Section 271, there has to be concealment of particulars of income by the assessee or the assessee must have furnished inaccurate particulars of income. Incorrect claim may not amount to furnishing of inaccurate particulars. Everything depends upon the return filed by the assessee, because that is the only document where the assessee can furnish particulars of his income. When such particulars are furnished inaccurately, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous. Mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding income of assessee



and such a claim can not amount to furnishing inaccurate particulars. The order imposing penalty is quasi-criminal in nature and the burden lies on the Department to establish that the assessee had concealed his income or furnished inaccurate particulars. Findings in assessment proceedings constitute good evidence in the penalty proceeding, but the authorities must consider the matter afresh. The *prima facie* satisfaction of the Assessing Officer that the case may deserve the imposition of penalty, can be discerned from the order passed during the course of assessment proceedings. The initiation of penalty proceedings cannot be set aside only on the ground that assessment order states “penalty proceedings are initiated separately, if otherwise it conforms to the parameters set out.”

12. In the case of ***Ms.Madhushree Gupta*** (*supra*), this Court observed as under:

“Under Section 271(1)(c) to initiate penalty proceedings the following pre-requisites should obtain: (i) The Assessing Officer should be “satisfied” that: (a) the assessee had either concealed particulars of his income; or (b) furnished inaccurate particulars of his income; or (c) infringed both (a) and (b). (ii) This “satisfaction” should be arrived at during the course of “any” proceedings. These could be assessment, reassessment or rectification proceedings, but not penalty proceedings. (iii) If ingredients contained in (i) and (ii) are present a notice to show cause under Section 274 of the Act shall issue setting out therein the infraction the assessee is said to have committed. The notice under Section 274 of the act can be issued both during or after



the completion of assessment proceedings, but the satisfaction of the Assessing Officer that there has been an infraction of clause (c) of sub-section (1) of Section 271 should precede conclusion of the proceedings pending before the Assessing Officer. (iv) the order imposing penalty can be passed only after assessment proceedings are complete.

At the stage of initiation of penalty proceedings the order passed by the Assessing Officer need not reflect satisfaction vis-à-vis each and every item of addition or disallowance if the overall sense gathered from the order is that a further prognosis is called for. The interrelation of additions or disallowances, if any, may be unrevelled only at the conclusion of the penalty proceedings. It would be sufficient compliance with the law that there is prima facie evidence of concealment of particulars of income or furnishing inaccurate particulars of income. This is so as the Legislature does not enjoin a full fledged investigation at the stage of initiation of penalty proceedings.

By a deeming fiction in Section 271(1B) inserted in the Income-tax Act, 1961 by the Finance Act, 2008 with retrospective effect from April 1, 1989, where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and if such order contains a direction for initiation of penalty proceedings under sub-Section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under sub-Section (1)."

13. From the order of the authorities below in the quantum proceedings and also the order of the AO in the penalty proceedings as confirmed by the Tribunal, it would be seen that all the authorities have recorded the plea of imprest amount of the assessee, as an afterthought. The explanation furnished by the assessee was evidently found to be false.



The Tribunal in quantum proceedings in ITA No. 623/2008 has referred to the statement of account in para 9 of its order dated 25th January, 2008, which would show that different amounts have been credited to the account of Rajeev Bhatia, Director of the assessee, on different dates. There being no expenditure of these amounts, it specifically noted that at one point of time, a sum of Rs.265000/- was advanced to Bhatia up to 26th May, 1997 and still further sum of Rs.175000/- was advanced on 14th September without taking account of the earlier amount. Similarly, there was an advance of Rs.940000/- upto 7th October, 1997 and without taking account of this amount, further amount of Rs.10 lakhs was advanced on 21st January. In this way a total sum of Rs.25 lakhs was advanced without there being any utilization towards expenditure. Prior to the date of search, these expenses were recorded in the books of accounts of the assessee and even uptill September 2001. From the above-noted order of the authorities below, it is clearly discernible that the AO had recorded *prima facie* satisfaction that the unexplained amount of expenditure recorded in the seized document was the unexplained income. It could not be said to be a mistake committed by the assessee in not making entries for such a long time. It was a clear case of furnishing



inaccurate particulars of the income by the assessee. From all this, it is established that the AO had arrived at satisfaction during the course of proceedings before initiating penalty proceedings. We have found the *prima facie* satisfaction discernible from the order of AO. In view of our agreeing with the finding that there existed *prima facie* satisfaction discernible from the order of the AO, the contention of the learned counsel for the Revenue that no such satisfaction was required for imposing penalty under Section 158BFA(2), wherein the penalty was automatic would only be an academic discussion and need not to be gone into. It is also because the question of law on which the appeal was admitted was under Section 271(1)(c) and not under Section 158BFA(2) of the Act.

14. From our above discussions, we answer the question in affirmative and in favour of the Revenue and against the assessee and consequently dismiss this appeal.

**M.L.MEHTA
(JUDGE)**

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

JUNE 03, 2011

AK/Dev