



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

+ **ITA No.793 of 2011**

% Reserved on: 13th October, 2011
Pronounced on: 18th November, 2011

COMMISSIONER OF INCOME TAX - II . . . APPELLANT

Through: Mr. N.P. Sahni, Sr. Standing
Counsel.

VERSUS

KAS MOVIE PVT LTD . . .RESPONDENT

Through: Mr. M.P. Rastogi with Mr.
K.N. Ahuja, Advocates.

CORAM :-

**HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**

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, Acting Chief Justice

1. This appeal was admitted on the following substantial question of law:

“Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in law in deleting penalty of ₹10,94,657/- levied by AO on account of filing inaccurate particulars of income/concealment of income pertaining to deduction under Section 80HHF of the Income Tax Act, 1961?”



2. The aforesaid penalty was levied by the Assessing Officer (AO) under Section 271 (1) (c) of the Income Tax Act (hereinafter referred to as 'the Act') on the ground that the assessee had claimed wrongful deduction under Section 80HHF of the Act amounting to ₹29,78,659/-. The AO observed that the necessary conditions for claiming deduction under the said Section were not satisfied, as the assessee had not exported any software, but merely provided services of technicians and helpers for shooting by foreign clients. The AO, therefore, disallowed the deduction under Section 80HHF of the Act claimed by the assessee and determined the total income of the assessee at ₹62,12,980. The AO also initiated proceedings under Section 271(1)(c) of the Act.
3. Insofar as the quantum assessment is concerned, though the CIT (A) had allowed the appeal and deleted the addition holding that the assessee was entitled to Section 80HHF of the Act, the Income Tax Appellate Tribunal ('the Tribunal' for brevity) reversed the decision of the CIT (A) and restored the order of the AO. The order of the Tribunal was confirmed by this Court as well. Thus, the issue that the



assessee was not entitled to the aforesaid deduction under Section 80HHF of the Act attained finality.

4. Insofar as the penalty proceedings are concerned, the AO imposed the penalty of ₹10,94,657/- on the ground that wrong claim of deduction under Section 80HHF of the Act was preferred. However, this penalty was deleted by the CIT(A) and the order of the CIT(A) was affirmed by the Tribunal as well relied upon the judgment of the Supreme Court in the case of ***CIT Vs. Reliance Petro Products (P) Ltd.***, (2010) 322 ITR 158. It is under this backdrop, this appeal has been admitted on the aforesaid question of law on which arguments were heard.
5. Under Section 271(1)(c) of the Act, penalty can be imposed upon the assessee if the AO or the CIT (A) is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. Explanation 1 to the said Section is added, which provides as under:
 - "Explanation 1. Where in respect of any facts material to the computation of the total income of any person under this Act.
 - (A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) to be false, or



(B) Such person offers an explanation which he is not able to substantiate (and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him), then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

6. By this deeming provision, it can be inferred that the particulars of income have been concealed by the assessee if the assessee fails to offer an explanation or offers an explanation which is found to be false or such person offers an explanation which is he is not able to substantiate and fails to prove that the explanation is *bona fide*. The Supreme Court in a recent judgment entitled ***Commissioner of Income Tax Vs. Atul Mohan Bindal***, 317 ITR 1 (SC) explaining the aforesaid provision in the following terms:

".....A close look at Section 271(1)(c) and Explanation (1) appended thereto would show that in the course of any proceedings under the Act, inter alia, if the Assessing Officer is satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income, such person may be directed to pay penalty. The quantum of penalty is prescribed in Clause (iii). Explanation 1, appended to Section 271(1) provides that if that person fails to offer an explanation or the explanation offered by such person is found to be false or the explanation offered by him is not substantiated and he fails to prove that



such explanation is bona fide and that all the facts relating the same and material to the computation of his total income has been disclosed by him, for the purposes of Section 271(1)(c), the amount added or disallowed in computing the total income is deemed to represent the concealed income. The penalty spoken of in Section 271(1)(c) is neither criminal nor quasi criminal but a civil liability; albeit a strict liability. Such liability being civil in nature, mens rea is not essential.

In the case of *Union of India and Ors. v. Dharamendra Textile Processors and Ors.* (2008) 306 ITR 277, a three judge Bench of this Court held that *Dilip N. Shroff* did not lay down correct law as the difference between Section 271(1)(c) and Section 276(c) of the Act was lost sight of. The Court held that the explanation appended to Section 271(1)(c) indicates element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The Court held thus:

The Explanations appended to Section 271(1)(c) of the Income Tax Act, 1961, indicate the elements of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The judgment in *Dilip N. Shroff* case (supra) has not considered the effect and relevance of Section 276(c) of the I.T. Act. The object behind the enactment of Section 271(1)(c) read with Explanations indicates that the Section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision 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 276(c).

The decision of this Court in *Dharamendra Textile Processors* has been explained recently by this Court in the case of *Union of India v. Rajasthan Spinning & Weaving Mills* (2009) 8 SCALE 231 thus:

At this stage, we need to examine the recent decision of this Court in *Dharmendra Textile*(supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted



and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textiles and we see no reason to understand or read that decision in that manner. In Dharmendra Textile the Court framed the five issues before it, in paragraph 2 of the decision as follows:

2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. (2007) 8 SCALE 304. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the `Act') inserted by Finance Act 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assess on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the `IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the `Rules') and a decision of this court in Chairman, SEBI v. Shriram Mutual Fund and Anr. 2006 (5) SCC 361 and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench

After referring to a number of decisions on interpretation and construction of statutory interpretation and construction of statutory provisions,



in paragraphs 26 and 27 of the decision, the court observed and held as follows:

26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.”

7. On the aforesaid parameters, we have to discuss the present case. The assessee had claimed deduction under Section 80HHF of the Act. The AO found that the assessee had not exported films software out of India, but had rather, handed over the same to the main producers in India itself without the involvement of C/F agent. He, thus, asked the respondent-assessee to show cause why the claim of deduction be not disallowed. The assessee replied to the same, but its contention was rejected by the AO. According to the AO, the fact of the matter was that nothing had been exported out of India by the assessee company. Another reason given by the AO was that the assessee had neither any ownership right in the film, nor its software vests in the assessee and therefore, there is no item which could be exported out of India. Therefore, primary condition for claim of deduction under Section 80HHF of the Act was not made.



On this basis, in the penalty proceedings, the AO recorded that the claim was made even when basic condition for deduction under Section 80HHF of the Act was not fulfilled and therefore, the assessee had concealed its income by way of furnishing wrong claim of deduction.

8. The CIT (A), on the other hand, deleted the penalty observing that there was full and complete disclosure with respect to the claim in the income tax return. Further, the claim of the assessee was duly audited by qualified CA. Therefore, the assessee had not suppressed or concealed any material of fact with respect to this claim. He further opined that it was not a case of furnishing of inaccurate particulars of income either. On the contrary, the claim of the assessee was rejected purely on legal grounds; there was not even a suggestion either in the assessment order or in the penalty order to hold that the assessee had knowingly or deliberately furnished inaccurate particulars of income; return was prepared as per the guidance/supervision of tax consultant; there was no basis to hold that the claim was dishonestly made in collusion with the auditors. This view is upheld by the Tribunal in the following words:



“6. We have considered the facts of the case and the submissions made before us. The findings of the Id. CIT (A), which have been reproduced earlier, are that the claim of the assessee was rejected on legal ground. There is no suggestion in the assessment order or the penalty order that the assessee has deliberately or knowingly furnished inaccurate particulars of income. The claim was supported by audit report and there is no basis to hold that the claim was dishonestly made in collusion with the auditor. Therefore, it was held by him that the claim cannot be said to be a false claim. Although the ingredient of contumacious conduct or mens rea is no longer required to be proved by the revenue in case of levy of penalty, as held by Hon’ble Supreme Court in the case of Union of India Vs. Dharmendra Textile Processors (2008) 306 ITR 27, the other finding of the Id. CIT (A) that the claim was rejected on legal ground, it was supported by independent audit report and all evidences were filed before the AO still hold good. In the case of Reliance Petro Products (P) Ltd., the decision of Hon’ble Supreme Court is that if all facts in respect of a claim are correctly mentioned or stated before the AO, then, it cannot be said making a claim and disallowance thereof will lead to the inference of furnishing inaccurate particulars. We are of the view that the ratio of this case is applicable on the facts and in the circumstances of the case. Coming to the decision in the case of Escorts Finance Ltd., the claim was inadmissible prima facie. In such a circumstance, the court held that the plea of a bona fide mistake cannot be accepted as the assessee was properly advised in legal matters. Such is not the case here. The issue as to whether the assessee is an exporter of film software or it transferred any film software outside India by any means is an issue which required deep scrutiny into the facts and thereafter proper application of the law. The claim was supported by the audit report which is not found to be collusive in nature. Thus it is not a case where deduction in the case of Zoom Communications (P) Ltd, the assessee had not explained the circumstances in which the so-called inadvertent mistake took place or who committed the mistake. In the case at hand, the explanation is that the claim is bona fide as it is supported by auditors report and even CIT (Appeals) allowed the deduction in quantum



appeal. In view of these facts, it can be concluded that the claim was consciously made but disallowed by the Tribunal and the Hon'ble High Court on greater appreciation of facts and the relevant law. Thus, there is no question of explaining the circumstances in which the mistake took place or the person who committed the mistake."

9. On the facts of this case, we are of the view that the Tribunal has rightly upheld the order of the CIT (A) and deleted the penalty. In fact, we may also add that for the purpose of claiming benefit under Section 80HHF of the Act, ownership of goods is not essential as held by the Supreme Court in the case of ***Sea Pearl Industries and Others Vs. Commissioner of Income Tax***, 247 ITR 578. Thus, when two views were possible and the assessee made the claim on the basis of advice of the consultants, it was not a case where the penalty should have been imposed.
10. We, thus, answer the question in favour of the assessee and against the Revenue, as a result, dismiss this appeal.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

November 18, 2011/pmc