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

\+ **ITA Nos. 243/2011 & 244/2011**

Reserved on: 18th April, 2012
% **Date of Decision: 5th July, 2012**

Commissioner of Income Tax-IV ....Petitioner
Through Mr. N.P. Sahni, Sr. Standing Counsel.

Versus

Fortis Financial Services Ltd. …Respondents
Through Mr. M.S. Syali, Sr. Advocate with
Mr. Mayank Negi, Ms. Hunsal, Syali, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.

These two appeals by the Revenue, which relate to the assessment years 1996-97 and 1997-98, impugn a common order dated 31st March, 2010, passed by the Income Tax Appellate Tribunal (tribunal, for short) in the case of Fortis Financial Services Limited, now known as Religare Technova Limited. The tribunal has upheld the order passed by the Commissioner of Income Tax (Appeals) [CIT (A), for short], deleting penalty under Section 13 of Interest Tax Act. 1974 (Act, for short), inter alia on the ground that there could be honest or bona fide difference of opinion on whether discounting charges were in the nature of interest income for computation of the tax under the Act. It has been observed that there could be difference or divergence of legal opinion on the said question. The

impugned order also disposes of two cross objections filed by the respo assessee.

2. By order dated 18th April, 2012, the following substantial question of law was framed:-

> "Whether the Income Tax Appellate Tribunal was justified and correct in holding that penalty under Section 13 of the Income Tax Act, 1974 imposed by the Assessing Officer cannot be sustained?"

3. The respondent assessee is a company engaged in business of providing financial services. It is accepted position that "interest" earned by the respondent assessee is chargeable to tax under the Act. The Assessing Officer noticed that the respondent assessee in the return for the Assessment Year 1996-97 had shown Rs.46,63,619/- under the head "Interest others" but had not included in the said amount on which tax was payable under the Act. Similarly, Rs.4,13,82,323/- and Rs.5,28,16,681/- towards 'bill discounting charges', in respect of assessment years 1996-97 and 1997-98 were not included in the amount on which tax was payable.

4. For the assessment year 1996-97, the Assessing Officer included Rs.48,63,619/- under the head 'interest others' and bill discounting charges to the extent of Rs.4,04,28,712/- for the purpose of computation of chargeable interest. An amount of Rs.9,52,611/- was reduced from the 'bill discounting charges' as received from other credit institutions. The aforesaid addition was deleted by the CIT (A), but the tribunal reversed the findings and has upheld the assessment made by the Assessing Officer.

5. In the assessment year 1997-98, the Assessing Officer had ma addition of Rs.5,02,07,620/- as an amount of Rs.26,09,062/- was reduced being discounting charges received from other credit institutions. This addition of Rs.5,02,07,620/- was deleted by the CIT(A) but the order of the Assessing Officer was restored by the tribunal.

6. Simultaneously, penalty proceedings were initiated for concealment and/or furnishing of inaccurate particulars.

7. Assessing officer issued show cause notices for levy of penalty, in respect of two assessment years and after considering the reply, passed two orders under Section 13 of the Act imposing the penalty for concealment or furnishing accurate particulars of chargeable interest. The CIT (A), deleted the said penalty on the ground that the issue/question raised related to honest and bona fide difference of legal opinion on whether bill "discounting charges" should be treated as interest or not for the purpose of the said Act. The CIT (A) relied on circular No. 647/1993 dated 22nd March, 1993, issued by the Central Board of Direct Taxes. He, however, did not deal with the alternative submission raised by the assessee that the initiation of proceedings under Section 13 of the Act was invalid because of "lack of satisfaction". The tribunal by the impugned order has approved and upheld the said decision.

8. Section 13 of the Act reads as under:-

> "**13. Penalty for concealment of chargeable interest**.—If the Assessing Officer or the Commissioner (Appeals) in the course of

> any proceeding under this Act, is satisfied that any person has concealed the particulars of chargeable interest or has furnished inaccurate particulars of such interest, he may direct that such person shall pay by way of penalty, in addition to any interest-tax payable by him, a sum which shall not be less than, but shall not exceed three times, the amount of interest-tax sought to be evaded by reason of the concealment of particulars of his chargeable interest or the furnishing of inaccurate particulars of such chargeable interest."

9. The said Section stipulates that penalty can be imposed when an assessee has furnished inaccurate particulars of interest or concealed particulars of chargeable interest. The Section does not use the word 'deliberately', 'willful' or 'willfully'. However, the Section does not have any explanation as in the case of Section 271(1)(c) of the Income Tax Act, 1961. To this extent the two provisions are not para materia. The net effect is that in the absence of "Explanation" the onus will not shift to the assessee. The purport and purpose behind Explanation to Section 271(1)(c) as explained in several decisions, is to shift the onus and impose an obligation on the assessee to prove and establish the reason/cause, and in case of failure to bonafidely elucidate and satisfy their conduct, penalty can be imposed under Section 271(1)(c) of the Income Tax Act. The Explanation raises a presumption which has to be rebutted by the assessee. In the absence of Explanation, the presumption or the shifting of onus does not take place but this does not mean that penalty cannot be imposed where an assessee has furnished inaccurate particulars or concealed particulars of chargeable interest. The word 'conceal' means to hide or to keep secret. As held in Law Lexicon, the

said word is derived from the latin word 'concelare' which implies 'c 'celare' to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent discovery of; to withhold knowledge of. However, the words 'inaccurate particulars' are much broader and wider. The word 'inaccurate' in Webster's Dictionary has been defined as 'not accurate; not exact or correct; not according to truth; erroneous; as inaccurate statement, copy or transcript'. The word 'particular' means detail or details, details of a claim or separate items of an account [see ***Commissioner of Income Tax vs. Reliance Petroproducts Pvt. Ltd.*** [2010] 322 ITR 158 (SC)]. The said part applies when an assessee furnishes inaccurate detail or details or a claim or a separate item of account.

10. It is settled that when two legal interpretations were plausible and there was honest and bona fide difference of opinion, penalty for concealment/furnishing of inaccurate particulars, should not and cannot be imposed. If the view taken by the assessee required consideration and was reasonably arguable, he should not be penalized for taking the position. The tax statutes are complex and there can be a bona fide difference of opinion on legal interpretation and understanding of a provision. In such cases, even when the interpretation placed by the Revenue is accepted, penalty should not be imposed if the contention of the assessee was plausible and bona fide. Of course full facts should be disclosed. The Supreme Court in ***Reliance Petroproducts & Anr.*** (Supra), examined their earlier judgment in the case of

Union of India vs. Dharmendra Textile Processors, [2008] 306 ITR 27

and it has been held as under:-

> "8. A glance at this provision would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The present is not a case of concealment of the income. That is not the case of the Revenue either. However, the learned counsel for Revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense) ; the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the section 271(1)(c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars. The learned counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In CIT v. Atul Mohan Bindal [2009] 9 SCC 589, where this court was considering the same provision, the court observed that the Assessing Officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This court referred to another decision of this court in Union of India v. Dharamendra Textile Processors [2008] 13 SCC 369 as also, the decision in Union of India v. Rajasthan Spg. & Wvg. Mills [2009] 13 SCC 448 and reiterated in paragraph 13 that :
>
> > "13. It goes without saying that for applicability of section 271(1)(c), conditions stated therein must exist."
>
> 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, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under section 276C of the Act. The basic reason why decision in Dilip N. Shroff v. 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."

11. It is, equally well settled that establishment of mens rea is not the requirement or a condition precedent to impose penalty. The question of mens rea etc. is important and relevant in the criminal proceedings but not for the purpose of civil penalty under Section 13 of the Act. The nature and character of the two proceedings is different. Presence of mental element or mens rea in most criminal proceedings is mandatory unless the legislature mandate is to the contrary but not so in the penalty proceeding under Section 13 of the Act. The earlier view that penalty proceedings were quasi criminal in nature and require establishment and proof of mens rea, has been discarded/disapproved in the judgment of the Supreme Court in Dharmanedra Textile Processor's case (supra). In the said decision, the view expressed in ***Dalip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr.*** (2007) 6 SCC 329, was overruled and after referring to series of decisions in ***Director of Enforcement vs. MCTM Corpn. (P) Ltd.*** (1996)2 SCC 471, ***JK Industries Ltd. vs. Chief Inspector of Factors & Boilers,*** (1996) 6 SCC 665, ***R.S. Joshi vs. Ajit Mills Ltd.*** (1977) 4 SCC 98, ***Gujarat Travancore Agency vs. CIT*** (1989) 3 SCC 52, ***Swedish Match AB vs. SEBI*** (2004) 11 SCC 641, the following legal principle:

> "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

In Corpus Juris Secundrum, Vol. 85 at p. 580, para 1023, has been approved.

12. We may note here that the Supreme Court in ***Union of India vs. Rajasthan Spinning & Weaving Mills*** (2009) 13 SCC 448, had examined Section 11AC of the Central Excise Act, 1994 and keeping in view the express language of the said Section has observed that the word 'deliberately' used therein was significant and requires mens rea. Explaining the said decision, the Supreme Court in ***Commissioner of Income Tax, Delhi vs. Atul Mohan Bindal,*** (2009) 9 SCC 589, has held that the said decision was confined to the particular Section i.e. Section 11AC of the Central Excise Act, 1944 in view of the peculiar and distinguishable words used therein.

13. Having considered and examined the contentions raised by the counsel for the parties, it appears to us that the assessee at best had lack of mens rea but this is not sufficient to quash the penalty under Section 13 of the Act. Declaration or statement in the return that the said amounts were not included for the purpose of tax may show/establish absence of mens rea but in the present case as elucidated below, this by itself does not justify cancellation or quashing of penalty as the ingredients of the provisions of Section 13 are satisfied.

14. What has been overlooked and not considered by the tribunal is the amendment made to Section 2(7) of the Act w.e.f. 1st October, 1991. Aforesaid Section after the amendment as applicable reads as under:-

"(7) "interest" means interest on loans and advances made in India and includes—

(*a*) commitment charges on unutilised portion of any credit sanctioned for being availed of in India; and

(*b*) discount on promissory notes and bills of exchange drawn or made in India,

but does not include—

(*i*) interest referred to in sub-section (1-B) of Section 42 of the Reserve Bank of India Act, 1934 (2 of 1934);

(*ii*) discount on treasury bills;"

15. Bare reading of the sub-section makes it clear that for the purpose of the Act, bill discounting charges have to be treated and regarded as 'interest'. The term 'interest' as per the definition clause i.e. Section 2(7) amended w.e.f. 1st October, 1991 is absolutely clear and unambiguous . There cannot be any doubt or ambiguity that 'bill discounting charges' have to be computed and included in interest for the purpose of tax payable under the Act. This is not the case of a bonafide, honest or even plausible different interpretation. Two divergent views on interpretation of Section 2(7) of the Act are not possible. To state so would be to ignore the obvious. Discount on promissory note and bills of exchange drawn or made in India by express stipulation have been included in the word 'interest'. What is excluded is 'discount on treasury bills'. There is no ambiguity or doubt in the said words. The single sentence observations of the CIT(A) and the tribunal to the contrary are unsustainable.

16. Reliance placed by the assessee on Circular No. 647 dated 22nd March, 1993 (reported in (1993) 200 ITR Statute 230) is entirely misconceived. The said circular was issued to explain applicability of provisions of Section 194A

of the Income Tax Act, 1961 and is not issued under the Act and doe explain Section 2(7) of the Act. The said circular has no application to the facts of the present case which pertains to interpretation of Section 2(7) and applicability of Section 13 of the Act. Thus, it is not possible to accept the contention of the respondent assessee that there was a genuine difference of opinion on the question; "whether or not bill discounting charges could be treated as interest or not?" Mere statement of the assessee that their contention was plausible and question/issue was debatable, is not sufficient to quash the penalty. The contention has to be examined holistically and objectively keeping in the provision, interpretation put forward and decision, if any, of appellate forum/courts. The only reasoning given by the CIT(A) which has been accepted by the tribunal, is to the effect that the facts indicate that there was a genuine difference of opinion, whether bill discounting charges should be treated as interest or not. There is no discussion or examination of the said aspect with reference to the statutory provision, basis of the interpretation put forward by the respondent assessee etc. The tribunal in respect of appeal for the assessment year 1996-97 has not even gone into and examined the following findings recorded by the Assessing Officer in the penalty order in respect of receipts of Rs.46,63,619/- under the "Interest others" :-

> "2. Briefly, the facts of the case are that during the course of assessment proceedings, it was also observed that the assessee company had shown receipt of Rs.46,63,619/- in the profit & Loss account on account of Interest Others but this

> receipt was not included in the computation of chargeable interest. On being asked to furnish the reasons for non-inclusion of the receipt referred above in the computation of chargeable interest, the counsel for the assessee had not advanced any argument. Hence, Rs.48,63,619/-, on account of interest other, was added to the chargeable interest of the assessee."

17. In view of the aforesaid, the question of law is answered in negative and in favour of the appellant Revenue and against the respondent assessee. However, we accept the prayer of the respondent assessee to remit the matter to the tribunal as they have not decided and disposed of the cross-objections filed by the respondent assessee on merits.

18. To cut short the delay, the parties are directed to appear before the Additional Registrar of the tribunal on 6th August, 2012, when a date of hearing will be fixed.

19. In the facts of the case, there will be no order as to costs.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(R.V. EASWAR)
JUDGE

July 5th, 2012
kkb