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

\+ ITA 1152/2011

KARAN RAGHAV EXPORTS PVT LTD. ..... Appellant
Through Mr. O.S. Bajpai, Sr. Adv. with Mr. V.N.Jha and Ms. Manasvini Bajpai, Advs.

versus

COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Abhishek Maratha, sr. standing counsel with Ms. Anshul Sharma, Adv.

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

O R D E R

% 14.03.2012

Vide order dated 12th January, 2012, the following substantial question of law was framed:-

> "Whether the Income Tax Appellate Tribunal was justified in confirming penalty of Rs.16,34,673/- under Section 271(1)(c) of the Income Tax Act, 1961?"

2. The present appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) pertains to the assessment year 2005-06 and impugns the order dated 28th February, 2011 passed by the Income Tax Appellate Tribunal (for short, the tribunal) dismissing ITA No.

5053/Del/2010 filed by the assessee and confirming the penalty und Section 271(1)(c).

3. The appellant is a company and in the return of income filed for the assessment year in question it had claimed depreciation on building, which was being used by the partnership firm in which the assessee was a partner. The total claim for depreciation was Rs.41,62,650/-. It is not in dispute and it is accepted that in the quantum proceedings it has been held that the assessee is not entitled to depreciation on the building as the same was being used by the partnership firm and not by the assessee company. The aforesaid addition/disallowance made by the Assessing Officer has been confirmed by this Court vide decision dated 1st November, 2010 in ITA No. 955/2010. The relevant portion of the said decision will be referred to and examined later on.

4. The question, which arises for consideration, is that whether the assessee has been able to discharge onus under Explanation 1 to Section 271(1)(c) of the Act. Section 271(1)(c) postulates and mandates imposition of penalty for concealment of income or furnishing of inaccurate particulars of income. Explanation (1) to Section 271(1) (c) stipulates when penalty under the said Section should be imposed and reads 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)] [or the Commissioner] 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.

5. The aforesaid explanation has come up for consideration and has been interpreted and elucidated by the Supreme Court and this Court. It has been held that imposition of penalty under the said Section is not akin to or like criminal proceedings and the question of *mens rea* or mala fides on the part of the assessee need not be examined and is not relevant. However, at the same time, it is not mandatory that in each case wherein addition or disallowance is made by the Assessing Officer, penalty must and should be imposed. When an assessee establishes and shows that he had acted bona fidely and all facts and material were disclosed by him penalty should not be imposed. (see clause B to Explanation 1)

6. In the present case, the assessee entered into and was inducted a partner in a partnership firm, namely, Gaurav International vide partnership deed dated 1st April, 2001. It was agreed that the factory premises located at 225, Udyog Vihar, Phase-1, Gurgaon would be used by the partnership firm for their business. The said property belongs to the appellant. However, the ownership of the property was not transferred to the partnership firm. The appellant-assessee continued to be the owner of the said property. Only right to use was given to the partnership firm.

7. Along with the return of income, the appellant-assessee had filed a table disclosing income from business. The relevant portion of the said table reads as under:-

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INCOME FROM BUSINESS	Depreciation Claimed in P & L A/c	Income shown in P& L A/c	Total Net Loss
Net (loss) as per Profit & Loss A/c	(4,162,650)	1, 411,927	(2,750,723)
Less Share of profit Partnership Firm M/s Gaurav Intl to be assessed separately In the hand of the firm and claimed as Exempt u/s 10(2A)		1,238,042	1,238,042
	(4,162,650)	173,885	(3,988765)

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Note: The assessee company enjoys share of profit from the partnership firm M/s Garav Int'l as one of the partner of the firm by virtue of the Partnership Deed dated 02.04.2004, copy of the Partnership Deed is enclosed for ready reference. On the basis of legal advice the company has claimed depreciation on Land and Building etc. bearing No.225, Udyog Vihar, provided by the company as owner, to the said firm for its used in terms of Partnership Deed of 2.4.2004. Depreciation on the said Land, Building etc is claimed u/s 32 of the Income Tax Act, 1961, being used for

the purpose of business. Further the company has earned interest of Rs.2,52,000/- from the aforesaid firm which is assessable u/s 28(v) of the Income Tax Act, 1961.
2. This is submitted keeping in view the law laid down by the Delhi High Court in CIT v. Textile & General Trading Co. (Delhi) 244 ITR 876."

8. The contention of the appellant-assessee was that under Section 28(v) of the Act, salary, bonus, commission or remuneration received from the partnership firm were to be assessed under the head "income from business". In the present case the assessee had received interest income, which was assessed under Section 28(v) of the Act. The assessee, accordingly, as per the said note, believed that it was entitled to depreciation on the building, which was being used by the partnership firm.

9. During the course of hearing before us, it was noticed that the aforesaid note refers to land and building. It was put to the learned counsel for the appellant whether the assessee had claimed depreciation on land as *per se* land is not a depreciable asset. Learned counsel for the appellant, in this connection, has drawn our attention to the assessment order wherein it is clearly recorded that the assessee had claimed depreciation of Rs.41,62,650/- on the building, which was being used by the partnership firm. We may note that the Assessing Officer and the appellate authorities in their order do not record or hold that the assessee had claimed depreciation on land.

10. The High Court while dismissing the appeal of the assessee the quantum proceedings had noticed several judgments, which were referred to and relied upon by the assessee in support of their claim. Reference was specifically made to the decision in ***Additional Commissioner of Income-tax, Delhi-III Vs. Manjeet Engineering Industries*** *154 ITR 509* and decision of Rajasthan High Court in ***Commissioner of Income-tax Vs. Amber Corporation*** *95 ITR 178*. The said decisions were distinguished on the ground that the partnership firm could have claimed depreciation but not the partner. The relevant paragraph of the decision dated 1st November, 2010 in the quantum proceedings reads as follows:-

> "In a case like this, the partnership firm which has utilized the said factory premises could have asked for depreciation. This so held by this Court in the case of ***Additional Commissioner of Income-tax, Delhi-III Vs. Manjeet Engineering Industries*** [154 ITR 509]. Another judgment rendered by the Rajasthan High Court is to the same effect in the case of ***Commissioner of Income-tax Vs. Amber Corporation*** [95 ITR 178] wherein it is held that the firm and the partners would be entitled to depreciation."

11. The tribunal in the impugned order has stated that the aforesaid observations of the High Court may not be applicable after the amendment and induction of Section 10 (2A) of the Act. The said provision stipulates that the share of profit received by a partner, from

the partnership firm which is separately assessed is exempt, subject certain conditions. We have noted that the said observation only to point out the debatable nature of the controversy and the fact that two views were possible. It is not a case of the Revenue that the partnership firm had claimed depreciation and two entities have claimed depreciation on the same capital asset.

12. The findings and reasons recorded by the tribunal to hold that the assessee has not been able to discharge onus under Explanation 1 to Section 271(1)(c) reads:-

> "From the above para of this judgment of Hon'ble High Court of Delhi rendered in the case of CIT Vs. Zoom Communications (supra), we find that it is held by Hon'ble High Court of Delhi that case that if the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bona fide, it will be difficult to say that the assesee would still not be liable to penalty u/s 271(1)(c) of the IT Act. In the present case, we find that the claim made by the assessee regarding depreciation is incorrect in law and such disallowance has been upheld by the Hon'ble High Court of Delhi also. Now, the 2nd aspect is as to whether such claim by the assessee is without any basis or not any whether the explanation furnished by the assessee is bona fide of not and not. We find that the assessee had given explanation by way of note in the computation of income filed along with the return of income and in the said note, it has been stated by the assessee that on the basis of legal advice, the assessee has claimed depreciation on land and building provided by the company as owner to the said firm for its use in terms of partnership deed

dated 2.4.2004. Copy of such legal advice has not been brought on record before the authorities below or even before us. Now, the question is as to whether there can be any basis to claim depreciation on an asset which is not being used by the assessee but being used by the partnership firm in which the assessee is a partner and the share of profit of the assessee from that partnership firm is not liable to tax in the hands of the assessee as per the provisions of Section 10(2A) of the Act. The basis given by the assessee is this that the assessee company has earned interest of Rs. 2.25 lacs from the firm, which is assessable u/s 28(v) of the IT Act. On the basis of this that some interest income from the partnership firm is liable to tax in the hand of the assessee u/s 28 (v), it cannot be said that the assets in question were being used in the business of the assessee. Interest on capital with partnership firm is assessable as business income in the hands of the partner but against such business income, only those expenses can be claimed and allowed, which are incurred for earning the interest income. One of such expenses can be interest expenditure if borrowed funds are used for providing capital to the partnership firm but depreciation on an asset owned by the assessee & used by the partnership firm cannot be claimed as deduction against such interest income, which is assessable as business income in the hands of the assessee partner. There is no basis at all to even claim such a deduction. Hence, we find that there is no basis of this claim or of this note given by the assessee in the computation of income. The existence of any legal advice on this has not been established by submitting a copy of such legal advice before us or before the authorities below or before the Hon'ble High Court of Delhi in the quantum proceedings. We find that in the P & L account of the assessee company as available on page 7 of the Paper Book, no expense has been accounted for by the assessee company on account of any legal advice. Hence, even existence of legal advice in doubt and therefore, the explanation submitted by the assessee

> cannot be accepted as bona fide in our considered opinion. Hence, in our considered option, the judgment of Hon'ble High Court of Delhi rendered in the case of Zoom Communications (supra) is squarely applicable in the present case and by respectfully following this judgment, we decline to interfere in the order of Ld. CIT (A)."

13. The aforesaid reasoning consists of two parts. The tribunal has held that copy of the legal advice has not been brought on record and perhaps was never obtained as no expense has been specifically claimed. Secondly, observations had been made on the deduction claimed under the head "depreciation".

14. On the second aspect, we record that a wrong deduction claimed can amount to furnishing of incorrect particulars. However, that is not the issue in question. The issue in question is whether the appellant has been able to discharge the onus under Explanation 1 to Section 271 and show that the claim made by them or the explanation offered with regard to the claim made was bona fide and that the facts relating to the same and material for computation of the total income had been disclosed. These are two facets of clause (B) to Explanation 1. As far as disclosure of facts is concerned, this is clear from the note, which was attached with the return itself. We have quoted the relevant portion of the note above. Full and correct facts have been stated in the said note. The other question is whether the claim made was palpably

wrong and legally untenable or a debatable and plausible claim which the assessee did not succeed on legal interpretation. We have examined the nature of the claim made and the findings recorded by the High Court in their order dated 1st November, 2010. The claim made by the appellant may have been rejected, but it cannot be said that the same was not plausible or legally tenable. This aspect has been discussed above and it has been held that the claim made was bona fide. Regarding the legal opinion in writing, it is not mandatory for a person to obtain legal opinion in writing. Assessees do take legal opinion and in the present case the return of income was duly audited. Claim for depreciation is a technical claim based on interpretation of legal provision. Legal opinion, in such cases, is frequently given by Chartered Accountants to help the company to prepare its return of taxable income. In the present case, there is no allegation that the quantum of depreciation claim was incorrectly computed. The note itself indicates that it is written by a professional.

15. The question whether penalty should be imposed under Section 271(1)(c) when a debatable and arguable legal issue is decided against the assessee and the assessee had disclosed full and correct facts is no longer *res integra*. The Courts in several judgments have drawn a distinction between a false claim, which cannot be

countenanced and claims, which are made on the basis of leg provisions which are debatable and quite plausible. Supreme Court in the case of ***CIT Vs. Reliance Petroproducts P. Ltd*** *[2010] 322 ITR 158 (SC)* has held as under:-

> "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 (page 13 of 317 ITR) :

> "13. It goes without saying that for applicability of section 271(1)(c), conditions stated therein must exist."

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 relationg 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 Processors2, 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.

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."

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."

16. Referring to this judgment, Delhi High Court in the case of ***Commissioner of Income-Tax Vs. Zoom Communication P. Ltd.*** *[2010] 327 ITR 510 (Del)* has held as under:-

> "The proposition of law which emerges from this case, when considered in the backdrop of the facts of the case before the court, is that so long as the assessee has not concealed any material fact or the factual information given by him has not been found to be incorrect, he will not be liable to imposition of penalty under section 271(1)(c) of the Act, even if the claim made by him is unsustainable in law, provided that he either substantiates the explanation offered by him or the explanation, even if not substantiated, is found to be bona fide. If the explanation is neither substantiated nor shown to be bona fide, Explanation 1 to section

271(1)(c) would come in to play and the assessee will be liable to for the prescribed penalty.

The assessee before us is a company which declared an income of Rs.1,21,49,861 and accounts of which are mandatorily subjected to audit. It is not the case of the assessee that it was advised that the amount of income-tax paid by it could be claimed as a revenue expenditure. It is also not the case of the assessee that deduction of income-tax paid by it was a debatable issue. In fact, in view of the specific provisions contained in section 40(a)(ii) of the Act, no such advice could be given by an auditor or other tax expert. No such advice has been claimed by the assessee even with respect to the amount claimed as deduction on account of certain equipment having become useless and having been written off. As noticed earlier, the Tribunal was entirely wrong in saying that section 32(1)(iii) of the Act applies to such a deduction. It was not the contention before us that claiming of such a deduction under section 32(1)(iii) was a debatable issue on which there were two opinions prevailing at the relevant time. In fact, the assessee did not claim, either before the Assessing Officer or before the Commissioner of Income-tax (Appeals) that such a deduction was permissible under section 32(1)(iii) of the Act. No such contention on behalf of the assessee finds noted in the order of the Tribunal. Thus, it was the Tribunal which took the view that section 32(1)(iii) could be attracted to the deduction claimed by the assessee. It is also not the case of the assessee that it was under a bona fide belief that these two amounts could be claimed as revenue expenditure. The assessee, in fact, outrightly conceded before the Assessing Officer that these amounts could not have been claimed as revenue deductions. The only plea taken by the assessee before the income-tax authorities was that it was due to oversight that the amount of income-tax paid by the assessee as well as the amount claimed as deduction on account of certain equipment being written off could not be added back in the computation of income."

17. Delhi High Court again in the case of ***Devsons P. Ltd. Vs. C*** *[2010] 329 ITR 483 (Del)* has held that when a legal issue arises for consideration, which is debatable but the claim made by the assessee is not accepted, there is no justification to invoke the penalty provisions under Section 271(1)(c). Divergent legal views on legal interpretation of a statute can take place, but it is not necessary that there should be uniformity or consensus of opinion on the aspects of law. Assessee cannot be faulted and penalty should not be imposed because the assessee had taken a particular stand point, unless there are grounds or reasons to show that the assesee had not disclosed all the facts before the departmental authorities concerned.

18. Keeping in view the aforesaid position, we answer the aforesaid question of law in negative i.e. in favour of the appellant and against the Revenue. The appeal is disposed of. There will be no order as to cost.

SANJIV KHANNA, J.

R.V.EASWAR, J.

MARCH 14, 2012
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