



* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on: 2nd November, 2010*
Judgment Pronounced on: August 03, 2011

+ ITA No.1266/2009

THE COMMISSIONER OF INCOME TAX-II Appellant

Through: Mr. Sanjeev Sabharwal, Sr. Standing
 Counsel with Mr. Utpal Saha,
 Advocates

versus

MAHAVIR IRRIGATION PVT. LTD. Respondent

Through: Mr.M.S.Syali, Sr. Advocate with
 Mr. Mahua Kalra, Mr.Mayank Nagi
 and Mr. Sumit K. Singh, Advocate

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE SURESH KAIT

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

SURESH KAIT, J.

1. The Assessee is a private limited company engaged in the business of providing service in connection with obtaining orders from Government Departments and has carried on the same business during the year under consideration as in the past besides acting as a



liaison and service agent of M/s Daewoo Motors (India) Limited. The assessee filed its return of income declaring loss of Rs.5,38,2000/- for the assessment year 1998-99 in question, on 30.11.1998 and the same was assessed under the provisions of Section 143 (3) of the Act.

2. On 05.03.2001, the Assessing Officer completed the assessment assessing the total income of the assessee at Rs.88,582/- being interest chargeable to tax under the head 'income from other sources'. The CIT (Appeals) vide order dated 31.10.2002 upheld the view taken by the Assessing Officer. CIT (Appeals), while examining the issue noticed that a sum of Rs.3 crores received by the assessee on 02.03.1998 from M/s Daewoo Motors India Ltd by virtue of clause 8 to 11 of the MOU between the DMIL and the assessee were shown in the balance sheet as on 31.03.1998 under the head 'trade deposits' in the liability side. The CIT (Appeals) after examining the said agreement was of the opinion that the receipt of Rs.3 crores was in the nature of revenue receipt pertaining to the assessment year 1998-1999 and since it has not been disclosed and offered for taxation by the assessee in return on income, CIT (Appeals) proceeded the matter by issuing notice under Section 251(2) of the Act for enhancement of income.



3. After giving due opportunity to the assessee, the matter was considered and the CIT (Appeals) held that the receipt of Rs. 3 crores was in the nature of income and should be taxed in assessment year 1998-1999. Consequent to this, CIT (Appeals) made an enhancement of Rs. 3 crores and after recording its satisfaction with respect to the concealment in body of appeal and further initiated penalty proceedings under Section 271 (1) (c) of the Act by mentioning as under:-

“Further, penalty proceedings under Section 271 (1) (c) of the Act have been separately initiated in regard to concealment of the particulars of this income of Rs.3 crores and furnishing of inaccurate particulars by labelling this amount as ‘deposit’”

4. Vide order dated 27.12.2004, the ITAT confirmed the order of CIT (Appeals) in quantum proceedings. Order of the ITAT has also been upheld by this Court.

5. Vide order dated 30.06.2005 the CIT(Appeals) passed order holding that the Assessee has concealed the particulars of its income to the extent of Rs.3 crores and further directed the Assessing Officer to calculate the penalty on the sum equivalent to Rs.3 crores on



which 100% of the tax was sought to be evaded. Directions were further given to the Assessing Officer to make proper computation of the penalty amount and issue fresh demand notice and challan.

6. This order of CIT (A) was challenged by the assessee and vide order dated 31.05.1998, ITAT has allowed the appeal against the order in penalty proceeding under Section 271 (1)(c) and set aside the order of CIT (Appeals). The Revenue/Department has preferred to challenge the order dated 31.03.2008 of ITAT resulting in the instant appeal.

7. The substantial question of law arises before us as we have admitted vide order dated 02.11.2010 as under:-

“Whether the ITAT erred in deleting the penalty under Section 271 (1)(c) on tax sought to be evaded by assessee declaring its income as refundable security deposits under liability?”

8. For convenience Section 271(1)(c) of the Tax is re-produced as under:-

“271 Failure to furnish returns, comply with notice, concealment of income, etc., (1) If the Income-tax Officer or the Appellate Assistant Commissioner, in the course of any proceedings under this Act, is satisfied that any person-



(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

He may direct that such person shall pay by way of penalty,--

(iii) in the cases referred to in clause (c), in addition any tax payable by him, a sum which shall not be less than twenty per cent, but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income”

9. The counsel for the Revenue has drawn our attention to the financial terms of the MOU which are as under:-

“8 That in consideration of the work, duties and functions undertaken by MIL to be performed under this MOU, DMIL will pay to MIL fee in the sum equal to 1% of the value of the contract that may be awarded by the DTC to DMIL pursuant to the DTC Tender, subject to a minimum of Rs.3 crores.

9 That the fee payable by DMIL to MIL in terms of clause 8 ante, will be deemed to accrue on the date on which the contract between the DTC and DMIL is signed or on which the DTC places an order on the DMIL for the supply of the buses, as the case may be, and DMIL under to make payment of the fee to MIL within 15 days of its accrual.

10 That DMIL will make an interest free deposit of Rs. 3 crores with MIL within six months from the date of this MOU that this deposit will be adjusted against the fee that may become payable to MIL in terms of Clause 8 ante.



11 That in the event of DMIL withdrawing from its offer against the DTC Tender or no order is being placed in its by DTC for any reason whatsoever, the amount paid to MIL under Clause 10 ante, shall not be refundable by MIL. ”

10. Learned counsel for the Revenue has further pointed out towards the judgment of Supreme Court in the case of *CIT Vs. Durga Prasad More, [1971] 82 ITR 540* , wherein it was held that “*if all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was suffering in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of recitals made in those documents.*”

11. It is argued that the reality of the MOU is that on signing of the MOU and acceptance of assignment the assessee got the sum of Rs.3 crores which was not refundable under any circumstances and was not conditional upon any future rendering of services. It was,



therefore, an income flowing from a commercial transaction assessable on receipt.

12. It was argued that keeping the MOU into the view, the assessee was engaged to act as the representative of DMIL and a sum of Rs.3 crores was received by the assessee on 02.03.1998 as per clause 10 above which was its income. However, in the return filed by the assessee for the considering year, the assessee did not show the amount as its income. The amount was shown in the balance sheet as on 31.03.1998 under the 'trade deposits' in the liabilities side. Therefore, it was a clear case of concealment of income and penalty was rightly imposed.

13. As against the above, Mr. Syali, learned Senior Advocate appearing for the respondent, reiterated his arguments which were advanced before the Tribunal and accepted by the Tribunal thereby deleting the penalty imposed by the CIT(A). Mr. Syali also submitted that in the facts and circumstances of this case, the Tribunal rightly held that there was no concealment of any particulars of income by the assessee; the assessee had disclosed all the particulars of the aforesaid MOU; the claim of the assessee was bona fide and two



views in the matter were possible. Therefore, it was not a case of imposition of penalty.

14. We have considered the submissions of counsel for both the parties. No doubt, in the first blush, the argument of the learned counsel appears to be convincing when one goes into the circumstances in which, in the first round of litigation relating to quantum proceedings, the receipt of Rs. 3 crores by the assessee from DMIL was treated as income. The Tribunal while confirming the quantum addition had interpreted the provisions of the MOU and particularly clause 11 on which the Tribunal commented that this clause was a clever piece of drafting and the syntax of this clause had been so structured so as to give impression that except only on the happening of one of the two contingencies stipulated therein, the security deposit could not be appropriate by the assessee as its income. We may also mention at this stage that the aforesaid decision of the ITAT was upheld by this Court in the appeal filed by the assessee and vide orders dated 11th October, 2006, the said appeal (ITA No.255/2002) was dismissed, inter alia, observing as under:-

“There is no room for controversy that so far as the present payment is concerned it was a minimum payment in terms of Clause 8. Larger amounts



could have been receivable by the assessee had a contract been placed on the DMIL by the Delhi Transport Corporation (DTC). Clause 11 uses the words for any reason whatsoever making it amply clear that the payment of Rs.3 crores would not be as reclaimable by DMIL. Referring to the CIT(A)'s order which holds that the appellant could retain the amount even where it renders no service whatsoever. Mr. Bhushan contends that it would be inconceivable that the sum of Rs.3 crores, which is a minimum commission or assured commission, could be retained by the assessee even if he had refused to render any service. We are of the view that this is reading too much into the words used by the authorities below. Reliance has also been placed on Commissioner of Income-Tax, Tamil Nadu-I v. A.V.M. Ltd., [1984] 146 ITR 355, which is a decision of the Division Bench of the Madras High Court. The facts there were totally different. The assessee was carrying on business as a distributor of cinematograph films and had taken security deposits from exhibitors which was to be adjusted against receipts by way of ticket sales. This is not the case where. For the same reason the decision in Commissioner of Income-Tax v. T.V. Sundram Iyengar and Sons Ltd., [1996] 222 ITR 344 is not of any advantage to the Appellant. The question there was at what stage would a deposit of a capital nature become an income in the hands of the assessee. On our reading of the Agreement between the Appellant and DMIL, the amount of Rs.3 crores had already been accrued to them as income in the year in which it was received by the appellant. No substantial question of law arises.

15. So far so good. However, in the penalty proceedings it is open to the assessee to still demonstrate that no case for imposition of



penalty is made out as there was no concealment on its part and that the claim made was bona fide. Legal position is abundantly clear by a series of judgments that quantum proceedings are independent proceedings and only when the ingredients of Section 271(1)(c) are satisfied, penalty can be imposed. When we look into the matter from this angle, we find that these ingredients have not been satisfied in this case.

16. In the first instance, we find that the Tribunal has rightly held in the impugned order that the assessee had not concealed the particulars of income. In this respect, it would be interesting to point out that not only the assessee had disclosed the receipt of aforesaid amount of Rs.3 crores from M/s. DMIL, albeit, showing it as a liability at that time (as according to the assessee the same had not been converted into income) the Assessing Officer, in fact, went into this aspect specifically and accepting the stand taken by the assessee, did not treat the said receipt as income. The issue was dealt with by the AO in the quantum proceedings. The assessment order makes an explicit reference to the receipt of Rs. 3 crores in the following words:-



“During the year under consideration, there is an increase of Rs.3 as security deposit. The assessee was asked to explain the same. As regard the deposit of Rs. 3 crores is reflected in the bank account as per photocopy submitted by the assessee, it has been explained by the assessee vide its letter dated 05.03.2001 as under:-

The receipt of Rs. 3 crores as security deposit by the assessee company from M/s Daewoo Motors (I) Ltd flows from the MOU entered into between them. The relevant clause 8, 9, 10 and 11 of the MOU have been reproduced in our letter dated 06.02.2001. We refer to them again. In terms of clause 9 of the MOU, the fee payable by DMIL to MIL will accrue on the date on which the contract between the DTC and DMIL is signed or on which the DTC places an order on DMIL for the supply of buses. The order or the contract has yet not been awarded by DTC and hence the security deposit of Rs.3 crores has not yet changed its character and remains as a security deposit with the assessee company.”

17. This would amply demonstrate that the assessee had not concealed the particulars of his income nor it is a case where the assessee deliberately furnished inaccurate particulars of such income. This would also demonstrate that two views were possible and the claim of the assessee was bona fide.



18. We may add at this stage that some of the observations of the Tribunal in the impugned order relating to interpretation of the clauses of the MOU may not be correct. This is more so when this Court also, while dismissing the quantum appeal of the assessee, interpreted these very clauses. Therefore, we may not entirely agree with the observations of the ITAT occurring in paras 19 to 22. However, still in view of the position explained by us in the foregoing paras, we are inclined to accept the conclusion of the Tribunal that the claim of the assessee about the amount in question being security deposit was bona fide as it was based on the possible interpretation of relevant clauses of the MOU. This is more so when the amount of Rs.3 crores in question paid to the assessee was not treated as income even by M/s. DMIL and this position was found to be correct by the Assessing Officer on inquiry made on M/s. DMIL. It may be that the claim of the assessee was not found to be acceptable in quantum proceedings on merits. However, as it was not a case of concealment, the provisions of Section 271(1)(c) attracting levy of penalty would not be applicable more so when all material facts relevant to the said claim were duly furnished by the assessee before the Assessing Officer.



19. We may usefully refer to the judgment of the Apex Court in *Commissioner of Income Tax v. Reliance Petroproducts Pvt. Ltd.*, [2010] 322 ITR 158 (SC). After taking note of various earlier pronouncements on the subject and reiterating that for imposition of penalty conditions stated in Section 271(1)(c) must exist. The Court explained the terms “concealment of income” and “furnishing inaccurate particulars” in the following manner:-

..... 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.”

20. As a result, the question is answered in the negative, that is in favour of the assessee and against the Revenue and this appeal is dismissed.

(SURESH KAIT)
JUDGE

(A.K.SIKRI)
JUDGE

August 03, 2011
‘HP’/Mk