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

Date of Decision: September 04, 2014

+ **ITA 479/2014**

COMMISSIONER OF INCOME TAX (CENTRAL)-III

..... Appellant

Through: Mr.Sanjeev Sabharwal, Sr.Advocate
with Ms.Swati Thapa, Advocate

versus

M/S. ANANT OVERSEAS P. LTD

..... Respondent

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J (ORAL)

Learned counsel for the Revenue submits that he has obtained instructions. By order dated 14.11.2013 in the quantum proceedings passed by the Income Tax Appellate Tribunal ('Tribunal', for short), an order of remand to the Commissioner of Income Tax (Appeals) [CIT(A)] was passed directing him to decide the appeal afresh.

2. We have examined the impugned order passed by the Tribunal dated 14.11.2013 affirming the view of the CIT (A) deleting the penalty of Rs. 15 lakhs imposed by the Assessing Officer under Section 271 (1)(c) of



the Income Tax Act, 1961 ('Act', in short). The appeal pertains to t
Assessment Year 2001-02.

3. The respondent-Assessee, during the period relevant to the Assessment Year was engaged in the investment of shares and securities cum business of shares and securities and other related activities. In the return of income filed in response to the notice under Section 153C of the Act, income of Rs. 10,65,750/- was disclosed. The respondent-assessee had also disclosed short term capital gains of Rs. 31,04,398/- on account of sale of 12,500 shares of Reliance India Ltd., 24,442 shares of Moser Baer India Ltd., 8886 shares of NIIT Ltd. and 15,300 shares of Software Technologies Group Ltd. The Assessing Officer held that the aforesaid sale and purchase was not in the nature of the investment but transactions relating to trading in shares, and accordingly, should be treated as business income.

4. In the penalty order passed by the Assessing Officer, he has recorded that the assessee did not disclose full and necessary particulars as the details were not mentioned in the return of income or any accompanying documents. Further, if the return had not taken up for scrutiny, the transactions in question would have been treated as short term capital gains and not as income from business. He accordingly rejected the detailed submissions made by the assessee to the effect that they were maintaining two separate accounts; for investments and the other for shares held as



stock-in-trade. Thus they had treated the gains or losses suffered on account of investment account as capital gains and transaction in shares held as stock-in-trade was treated business income. It may be relevant to note here that in the assessment order, one of the reasons given by the Assessing Officer to treat the shares in question as stock-in-trade was that the broker notes did not indicate whether the shares were procured as investment or as stock-in-trade and the transaction statements did not show any demarcation. Further, the respondent-assessee had not shown or established that it had taken physical delivery of the said shares.

5. The CIT (A) deleted the penalty under Section 271(1)(c) of the Act criticizing the aforesaid observations of the Assessing Officer and recording that the bills/notes issued by the brokers would not mention whether the shares purchased/sold were being treated by the respondent-assessee as investment or as stock-in-trade. In Demat Accounts, the relevant numbers and details of the shares were entered and the shares were not required to be handed over physically. On the question, whether there was full and true disclosure of material facts, the CIT (A) has recorded that the finding of the Assessing officer was incorrect as all particulars relating to capital gains were duly disclosed in the return as well as in the Balance Sheet which indicated that the respondent-assessee was maintaining a clear demarcation between the shares which were treated as investments and shares held as



stock-in-trade for business. He has recorded that the respondent-assessee has submitted relevant copies of the books of accounts pertaining to the capital account, step-wise investment accounts, purchase account and sales account. We may record that in the written submission filed before the CIT (A) as recorded in the order, it was stated that the details of shares held as investments was duly mentioned in Schedule 4 of the Balance Sheet and in Note No. 6 forming part of the Balance Sheet, detail of transactions which were treated as business was clearly reflected. Further, the shares which were sold and treated as short term capital gains were not accounted for in the opening balance nor in the closing balance. In the books of accounts also, the shares in question were shown under the head 'investment' and in the profit and loss account, short term capital gains was duly credited.

6. The aforesaid finding of the CIT (A) was affirmed by the Tribunal in the impugned order dated 14.11.2013. Thus, we do not think, the finding of the Assessing Officer that material facts were not duly disclosed by the assessee is correct. No document or material has been filed before us to support or contend that the finding of the appellate authorities including the Tribunal is perverse or factual incorrect.

7. Now, coming to the question of bona fides and the explanation offered by the respondent-assessee, we notice that the question whether the shares were held as investment or stock-in-trade is highly debatable and a



difficult call in many a cases. As noticed above, the respondent-assessee was investing in shares and securities and also dealing in purchase and sale of securities. There is no adverse comment or observation of the Assessing Officer on the submission and assertion made by the respondent-assessee that they were maintaining two separate portfolios, one for shares held as investment and the other for the shares held as stock-in-trade. The assessment order itself records that there were number of transactions relating to the shares which were held as stock-in-trade. Further, the aforesaid demarcation of shares held as investment and as stock-in-trade had existed in earlier and subsequent years also. We have already noted the two observations in the assessment order; (1) physical delivery of the shares was not taken and (2) brokers did not indicate whether the shares were held as investment or as stock-in-trade, are not acceptable and cannot be a ground to hold that the shares were held as stock-in-trade and not as an investment. The assessee had brought forward long term capital loss of Rs. 39,79,915/- and the short term capital gains were sought to be set off from the said long term capital loss. This is indicative of the fact that in the earlier years, the assessee had sold or transferred certain shares held as an investment and suffered long term capital loss. The respondent-assessee was certainly holding shares as investment. In fact, the assessment order itself records that the respondent-assessee held certain shares of group companies as investment. On the said aspect, we would like to refer to the reply given by



the respondent-assessee, giving the explanation why the penalty concealment should not be imposed, which reads as under:

"(i) "That the assessee maintained separate account for investment & stock-in-trade. and whatever profit/loss resulted on investment, the' assessee, treated it as capital. gain & in the case of stock-in-hand, treated the same as business income.

(ij) That the assessee disclosed full particulars & submitted all the necessary particulars in support of short term capital gain at the time of assessment proceedings vide submission dated 31.10.2007.

(iii) That for levy of penalty u/s 271(1)(c), the pre-requisite is that there should be a concealment of particulars of income or furnishing of inaccurate particulars of such income. In the instant case of the assessee, it has been contended that none of the particulars of the income have been concealed or inaccurately furnished.

(iv) Relying upon the judgement of Hon'ble Supreme Court in the case of Cement Marketing Co. of India Ltd. vs. Asstt. Commissioner of Sales Tax, Indore. it was contended that a return cannot be false unless there is an element of deliberateness in it... where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to include it, it would not be right to condemn the return as a false return inviting imposition of penalty.

(v) Relying upon the judgement, of the Hon'ble Delhi High Court in the case of CIT vs. Bacardi Martini India Ltd. [2007] 158 Taxman 348 (Delhi), it was contended that the material facts for computation of income was brought by the assessee, on record and none of the particulars had been concealed and submitted inaccurately.

(vi) ,The assessee invited attention towards the Judgement of Hon'ble Rajasthan, High Court, Jaipur Bench in the case of Chender Pal, Bagga vs. the Appellate Tribunal and another (2003) 261 ITR 67 (Raj.). Relying upon this judgement, it was contended that if the assessee has claimed any exemption after disclosing the relevant basic facts and under ignorance of the provisions of the Act of 1961 has not offered that amount for tax, in such cases, penalty should not be imposed.

(vii) The assessee also placed reliance upon the judgement of Hon'ble ITAT, Delhi Bench 'F' in the case of DCIT, Circle14 (1), New Delhi vs. M/s PEC Ltd. reported as 2010-TIOL-50-ITAT-DEL



and contended that only because addition is sustained, the penalty is not automatic.

(viii) The assessee also placed reliance upon the judgement of Hon'ble ITAT, Ahmedabad Bench 'B' in the case of ADIT (International Transaction) Vs. Precision Drilling (Cyprus) Ltd. reported as 2010-TIOL-07-ITAT-Ahm. and contended that merely because some disallowances' are made, penalty cannot be made.

(ix) It was also contended that the material facts for computation of income had been brought by the assessee on record and none of the particulars had been concealed nor any inaccurate particulars were submitted”.

8. The aforesaid factors and details were duly noticed and considered by Tribunal. Reference has been made to the decision of the Supreme Court in **Commissioner of Income Tax Vs. Reliance Petro Products Pvt. Ltd., [2010] 11 SCC 762**, wherein it has been held:

“10. Section 271(1)(c) is as under:

“271. Failure to furnish returns, comply with notices, concealment of income, etc.—(1) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person—

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income.”

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. Present is not the case of concealment of the income. That is not the case of the Revenue either. However, the learned counsel for the 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 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.

11. 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 words concerned. 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 para 13 that: (*Atul Mohan Bindal* case [(2009) 9 SCC 589] , SCC p. 597, para 13)

“13. It goes without saying that for applicability of Section 271(1)(c), conditions stated therein must exist.”

12. 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.

13. In *Dilip N. Shroff v. 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) 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.

14. It was further held in *Dilip N. Shroff* [(2007) 6 SCC 329] that the assessee 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.

9. In view of the aforesaid position, we do not think any substantial question of law arises for consideration before us in this appeal. The appeal is dismissed. No costs.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

SEPTEMBER 04, 2014/akb