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

\+ **INCOME TAX APPEAL NO. 586/2014**

Date of decision: 11th September, 2014

COMMISSIONER OF INCOME TAX

..... Appellant

Through Ms. Suruchi Aggarwal, Sr.Standing Counsel.

versus

M/S THE ORIENTAL INSURANCE CO. LTD.

..... Respondent

Through Mr. Mayank Nagi & Mr. Tarun Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL):

This appeal by the Revenue relates to Assessment Year 1992-93 and impugns order dated 4th March, 2014 passed by the Income Tax Appellate Tribunal ("Tribunal", for short) upholding the order passed by the Commissioner of Income Tax (Appeals) deleting penalty of Rs.44,42,839/- imposed by the Assessing Officer under Section 13 of the Interest Tax Act, 1974 ("Act", for short).

2. The respondent-assessee, a Government of India undertaking, was engaged in the business of general insurance during the period in question. Pursuant to the return filed by the respondent-assessee,

assessment order dated 20th March, 1995 was passed under Secti 8(2) of the Act computing chargeable interest at Rs.3,84,84,910/-. Subsequently, notice under Section 10 of the Act dated 26th December, 1996 was issued and a return of chargeable interest of Rs.3,92,51,082/- was filed on 30th January, 1997. By order dated 16th March, 1998, the Assessing Officer added the following amounts to the chargeable interest:-

> "1. Interest on special deposits – Chargeable to tax, as it is intt. on deposit and it with RBI (Rs. 10,08,64,111/-) is from RBI which is not a credit institution.
> 2. Interest on deposits with RBI (22,50,000) – Not interest on "Loans & Advances – but on 'deposits' and hence chargeable to tax.
> 3. Interest on loans to HUDCO (Rs.2,04,00,004/-) – Not chargeable to tax, as it is a credit institution.
> 4. Interest on loans to GIC Housing finance (Rs.34,50,000/-) – A credit institution. Not chargeable to tax.
> 5. Interest from Banks- call money (Rs.2,13,17,614/-) – Interest is not on 'Loans & Advances' hence chargeable to tax.
> 6. Interest from Banks – certificate deposit (Rs.31,18,884/-) –
> 7. Interest from Banks-Bills rediscounting scheme (Rs.8,74,28,57) "

3. The aforesaid additions were made subject matter of challenge before the appellate authorities, including the Tribunal. The Tribunal by order dated 21st February, 2006 substantially deleted several additions, but in respect of following two items restored the matter to

the Assessing Officer; (i) interest on call money with bank Rs.2,13,17,614/- and (ii) interest on bills re-discounting scheme Rs.8,74,28,576/-, i.e., total Rs.10,87,46,190/-. The remand order was passed to determine the nature of interest.

4. By order dated 14th December, 2006, the Assessing Officer referred to definition of the term "interest" in Section 2(7) of the Act to hold that the aforesaid amounts had to be treated as interest under the said Section. He rejected the contention of the respondent-assessee relying upon Section 2(5A)(1) of the Act. We shall be referring to the said contention in detail subsequently. The aforesaid order dated 14th December, 2006 has attained finality.

5. The Assessing Officer thereafter initiated penalty proceedings under Section 13 of the Act and by order dated 20th June, 2007 penalty of Rs.44,42,839/- was imposed in respect of the two additions. On appeal, Commissioner of Income Tax (Appeals) vide order dated 31.8.2010, deleted the said penalty after referring to several facts, which we shall notice below. The Tribunal has in its impugned order affirmed the aforesaid finding.

6. Learned Senior Standing Counsel for the Revenue has drawn our attention to Section 2(7), which defines "interest" to mean interest on loans and advances made in India and after amendment w.e.f. 1st Oct, 1991, it includes bills discounting. Section 2(7) of the Act, as amended

with effect from 1st Oct, 1991, reads as under:-

> "2(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;"

7. Clause (b) is not omnibus but stipulates that that the discounting on promissory notes and bills of exchange drawn or made in India would be treated as "interest" on loans and advances for the purpose of Section 2(7) of the Act. Thus, with effect from 1st Oct, 1991 there is no doubt or ambiguity that bill discounting charges on promissory notes or bills of exchange have to be included in the interest for the purpose of tax payable under the Act. However, when the appeal had come up for hearing yesterday, learned counsel for the respondent-assessee, had submitted that the present case does not include interest earned on discounting of promissory notes or bills of exchange. He had referred to item No. 7 in the assessment order dated 16th March, 1998 wherein the term used was "interest from banks-bills re-

discounting scheme". At the request of the counsel for the appellar Revenue, the appeal was adjourned to enable her to ascertain the details and know the correct position. Learned Senior Standing Counsel has filed before us copy of returns filed under the Act on 31st December, 1992 and 30th January, 1997. She states that copy of the scheme was probably not filed by the assessee during the course of the assessment proceedings and is not available on the record. It is submitted that earlier similar contention was not raised.

8. It is apparent from the assessment orders dated 16th March, 1998 and 14th December, 2006 that the respondent-assessee had relied on Section 2(5A)(1) to contest that interest under the Banks Bills Rediscounting Scheme amounting to Rs.8,74,28,57/- cannot be subjected to tax under Section 2(7) of the Act. The amount so stated had accrued on transactions with the Reserve Bank of India. The Assessing Officer disagreed, observing that for Section 2(5A)(1), to apply, the transaction should be with a credit institution, which meant a banking company to which Banking Regulation Act, 1994 applied. However ,the Reserve Bank of India, was a statutory authority; the Central Bank, constituted under a special enactment. The Reserve Bank of India was/is neither a bank nor a banking company and hence cannot be treated as a credit institution. In other words, the Assessing Officer held that in case interest had been earned on the same transactions but

with the scheduled banks, it would have been exempt under Secti 2(5A)(1) of the Act, but as the transactions were with the Central Bank, i.e., Reserve Bank of India, the income or interest earned would be taxable.

9. The stand of the respondent-assessee, that under Section 2(7) interest means interest on loans and advances and, therefore, necessarily refers to commercial transactions entered into by the assessee, was rejected. The submission, that the definition of interest had been expanded to include discount on promissory notes and bills of exchange, but it was not the legislative intention to tax interest earned on transactions with Reserve Bank of India as they did not partake or have a commercial character, was not accepted.

10. The respondent-assessee may be wrong and may have erroneously interpreted and relied upon Section 2(5A)(1) of the Act, but their contention does not and cannot be treated per se without merit or baseless. The question related to the definition of the term "credit institution" and if scheduled banks are included therein, whether or not Reserve Bank of India should be treated alike and similarly. The respondent-assessee has filed before us a copy of the written submissions filed before the Assessing Officer in this regard and the relevant portion thereof reads as under:-

"The above provision clearly suggest that the

intention of the legislature was to charge interest tax on interest accruing or arising on loans and advances which are in the nature of loans and advances. Since the interest of Rs.10,87,46,190.00 mentioned above is not interest on loans and advances, the same is not chargeable to tax under the Interest Tax Act, 1974. In fact, even the learned Assessing Officer, vide his assessment order dated 16.03.1998 specifically mentioned, inter alia, that the interest on the above mentioned two items are not on "Loans & Advances", which concurs with our contention.

Without prejudice to the above contention that the interest on call money with banks and interest on Bills Rediscounting Scheme are outside the scope of chargeability to interest tax, the addition of Rs.10,87,46,190.00 made on these two items by the learned Assessing Officer is specifically exempt from the scope of chargeable interest under section 5 read with sub-section 5A of section 2 of the Interest Tax Act, 1974, which clearly excludes interest received from other credit institutions from the scope of "Chargeable Interest". The exemption has not been allowed on these interest received from other credit institutions, holding that the exemption under Section 5 is available only on interest not being in the nature of loans & advances and the exemption is denied. Section 2(7) defines "interest" to be interest on loans and advances. Under the provisions of Section 5, if the scope of chargeable interest is interpreted to include interest on call money with banks and interest on Bills Rediscounting Scheme treating them to be interest on loans and advances, the exemption cannot be denied holding that the interest is not on loans and advances. It is humbly submitted that the above instructions of CBDT are not correct interpretation of the provisions of the Interest Tax Act, 1974. The exclusionary provision was omitted from the present version of the Interest Tax Act because the head 'Interest on Securities' itself had already been omitted from the Income Tax Act, as revised in 1991. The purpose of omitting the exclusion clause

> from the Interest Tax Act was to make it fall in line with the Income Tax Act and not to cover larger tax base than the earlier one."

11. The Commissioner of Income Tax (Appeals) and the Tribunal have also noted and referred to clarification made by Central Board of Direct Taxes vide instruction No. 1923 dated 14th March, 1995 suggesting that interest on debentures, bonds, securities, etc. and deposits should be also made subject matter of tax under the Act. The said circular/instruction was issued after the original return was filed on 31st December, 1992.

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

> "Section 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.]

13. This Court had the occasion to interpret Section 13 of the Act in ITA No. 243/2011, ***Commissioner of Income Tax-IV versus Fortis***

Financial Services Limited, decided on 5th July, 2012 and it was he

as under:-

> "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 'con' & '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 277 (SC) 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."

14. When we apply the aforesaid parameters to the factual matrix of the present case in relation to interest on Banks-Bills Re-discounting Scheme, we do not think the Tribunal has erred in upholding the order of the Commissioner of Income Tax (Appeals) in deleting the penalty. Learned counsel for the respondent-assessee has also drawn our attention to the decision of the Calcutta High Court in the case of ***National Insurance Company Limited versus Commisioner of Income Tax and Another***, (2011) 339 ITR 573 (Cal.) wherein it was held that Section 2(5) would override and interest earned on bill discounting with credit institutions would not be included in interest under Section 2(7) of the Act.

15. We also record that the counsel for the respondent-assessee has placed before us decision of the Tribunal in Income Tax Appeal Nos.11/Cal./1997 and 18/Cal./1999 in respect of Assessment Years 1992-93 and 1995-96 in the case of ***National Insurance Company Limited, Kolkata versus DCIT*** wherein the stand propounded by the

respondent-assessee was accepted in respect of call money. T respondent-assessee in respect of call money with banks has succeeded in the subsequent assessment years in appeals filed under the Act before the Tribunal and this factum is recorded in the order passed by the Commissioner of Income Tax (Appeals) as well as the Tribunal.

In view of the aforesaid position, we do not find any reason to interfere with the order of the Tribunal affirming deletion of penalty. The appeal is accordingly dismissed.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

SEPTEMBER 11, 2014
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