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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 439/2003

Reserved on: January 12, 2016

Date of decision: February 4, 2016

ROGER ENTERPRISES P. LTD.

..... Appellant

Through: Mr. Ajay Vohra, Senior Advocate with
Ms. Kavita Jha and Mr. Vaibhav Kulkarni,
Advocates.

versus

COMMISSIONER OF INCOME TAX DELHI

..... Respondent

Through: Ms. Lakshmi Gurung along with Mr. P.
Roy Choudhary, Standing counsels and Mr. Ishant
Goswami and Mr. Rajesh Kumar, Advocates.

And

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ITA 156/2014

COMMISSIONER OF INCOME TAX DELHI

..... Appellant

Through: Ms. Lakshmi Gurung along with Mr. P.
Roy Choudhary, Standing counsels and Mr. Ishant
Goswami and Mr. Rajesh Kumar, Advocates.

versus

ROGER ENTERPRISES P. LTD.

..... Respondent

Through: Mr. Ajay Vohra, Senior Advocate with
Ms. Kavita Jha and Mr. Vaibhav Kulkarni,
Advocates.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

J U D G M E N T

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04.02.2016

Dr. S. Muralidhar, J.:

1. ITA No. 439 of 2003 filed by the Assessee, Roger Enterprises Private Limited, under Section 260A of the Income Tax Act, 1961 ('Act') is directed against the common impugned order dated 8th May 2003 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 1515 to 1517/D/97 for the Assessment Years ('AYs') 1981-82, 1982-83 and 1983-84.

2. By the said impugned order, the ITAT upheld the common order dated 23rd December 1996 passed by the Commissioner of Income Tax (Appeals) ['CIT (A)'] which in turn affirmed the separate reassessment orders dated 25th March 1996 passed by the Assessing Officer ('AO') under Section 148 of the Act for the said AYs.

3. The background to the appeal is that the Assessee company claimed to represent customers for supply of equipments required by various governments and semi-government departments/undertakings. According to the Assessee, it engages sub-agents to render the services of bringing proposals for prospective tenders/contracts; ensuring follow up with the customers and concerned departments; forwarding necessary marketing and business information; procuring necessary business information in connection with the items supplied; assisting the principals with the submission of competitive offers; assisting the principals and guiding the Assessee on necessary infrastructure transportation, clearing and handling of goods whenever required depending on the nature of the contract. According

to the Assessee, if the business materialised, the sub-agents received the agreed commission out of the commission received by the Assessee.

4. While completing the assessments for AYs 1981-82, 1982-83 and 1983-84 by the orders dated 29th October 1982, 28th September 1983 and 24th May 1983 respectively under Section 143 (3) of the Act, the AO allowed the deductions as claimed by the Assessee towards payment of commission as under:

Asstt. Year	Amount of commission	Parties to whom paid	Name of contract
81-82	21,86,042	Excavators India (P) Ltd. ('EIP')	Telecom Equipment from 1975 to 1980
82-83	33,30,162	Triveni International Production (P) Ltd. ('TIP')	Bulb Type Generator from 1978 to 1982
	10,47,810	Bahri & C. (P) Ltd. ('BCP')	Casing Pipe contract for 1980 & 81
83-84	11,45,983	Triveni International Production (P) Ltd. ('TIP')	Bulb Type Generator from 1978 to 1982

5. According to the Assessee, the contracts in respect of which the commission was paid continued for two to five years. It was stated that there was voluminous correspondence in respect of each of the contracts. Further, documents including bank statements of the Assessee for all the three years, receipts issued by the parties, confirming the receipt of commission, which contained their permanent account numbers ('PAN'), bank statement of TIP, one of the recipient company, and day-to-day correspondence were filed with the AO.

6. In May 1987, a search was conducted on the entities to whom commission was purportedly paid by the Assessee. According to the Revenue, during the course of search, Mr. M.K. Meattle, Managing Director (MD) of the aforementioned three payee companies admitted in a statement given on 15th September 1987 that the transactions with the Assessee were *hawala* entries. This information was then passed on to the AO of the Assessee who on 18th March 1988 issued notice under Section 148 of the Act for reopening the assessments for the AYs in question. The reason for issuance of notice was that there was tangible material to show that commission paid by the Assessee was not genuine.

7. Mr. Meattle gave another statement before the AO on 8th March 1990 *inter alia* stating that he was contacted by Mr. A.K. Jhunjunwala, Chartered Accountant ('CA') who claimed to be a relative of Mr. Jajodia, the then MD of the Assessee. Mr. Meattle stated that money would be withdrawn from the bank accounts immediately after the commission cheques were deposited. Mr. Meattle stated that he did not receive any commission at the time of such withdrawal of cash because the deal was that 1% of commission would be paid after completion of transactions of Rs. 1 crore. According to Mr. Meattle, the receipt of commission was neither accounted for in the books of account of the companies nor declared to income tax authorities.

8. On 8th March 1990 the AO forwarded to the Assessee a copy of Mr. Meattle's statement. The Assessee was offered an opportunity to cross-examine Mr. Meattle on 13th March 1990. By letter dated 13th March 1990

addressed to the AO, the Assessee expressed its inability to cross-examine Mr. Meattle at a short notice of two working days since the records pertaining to the previous eight years required to be examined.

9. Since the time period for completing the reassessments was about to expire, by three separate orders dated 29th March 1990, the AO completed the reassessment for the three AYs in question and added back the amounts representing the commission purportedly paid by the Assessee.

10. Meanwhile, subsequent to the reassessment proceedings and during the pendency of the penalty and appellate proceedings, on 13th November 1990 the statement of Mr. Jhunhunwala was recorded under Section 132 (4) of the Act by the Assistant Director of Income Tax (Investigation) [‘ADIT (Investigation)’], Bombay wherein Mr. Jhunhunwala admitted that Mr. Jajodia, MD of the Assessee was related to him and that on the instructions of Mr. Jajodia, he used to deposit cheques and withdraw cash from the accounts of the companies of Mr. Meattle, whom he knew. Another statement of Mr. Jhunhunwala was recorded on 15th March 1991 in which he admitted to filling in the pay-in-slips and the signed blank cheques. The cheques were drawn on the companies of which Mr. Meattle was the MD. As per the instructions of Mr. Jajodia, Mr. Jhunhunwala handed over the cash immediately either to Mr. Jajodia or Mr. Lok Nath Saraf.

11. Aggrieved by the reassessment orders dated 29th March 1990, the Assessee filed appeals before the CIT (A). The appeals for AYs 1981-82, 1982-83 and 1983-84 were dismissed by the CIT (A) by orders dated 16th May 1991, 15th April 1991 and 27th May 1991 respectively. The CIT (A)

held that adequate opportunity to cross-examine the witnesses had been provided to the Assessee.

12. Against the orders of the CIT (A), appeals were filed by the Assessee before the ITAT. These appeals were disposed of by a common order dated 24th December 1993 by the ITAT holding that the AO should have granted some more time to the Assessee to gather the materials needed for a proper cross-examination of Mr. Meattle and Mr. Jhunjhunwala and that the request made in that behalf by the Assessee was bonafide and should have been accepted. The matter was therefore, restored to the file of the AO.

13. On remand, the AO asked the Assessee to be ready for cross-examination of Mr. Meattle and Mr. Jhunjhunwala on 27th February 1996. One day prior thereto, i.e., on 26th February 1996 the Assessee filed a letter with the AO requesting for supply of certain documents of the three payee companies (i.e EIP, TIP and BCP). On the day fixed for cross-examination at 11 am, Mr. Jhunjhunwala was present in the office of the AO. At the time of cross-examination at 11 am, neither the Assessee nor anyone on behalf of the Assessee attended the office of the AO. Even till 2.30 pm no one appeared. At 3 pm Mr. Jajodia and one Mr. M.K. Jain were present. They were asked to cross-examine Mr. Jhunjhunwala. However, they categorically refused to cross-examine him on the ground that he was stranger to the transactions. According to the Assessee, without first cross-examining Mr. Meattle, no useful purpose would be served in cross-examining Mr. Jhunjhunwala. Accordingly, the Assessee declined to cross-examine Mr. Jhunjhunwala. Mr. Meattle did not turn up till 4 pm. Before the

AO, counsel for the Assessee stated that they cannot wait for long for Mr. Meattle to appear and left the office of the AO at 4.05 pm.

14. The ITAT has in the impugned order noted that from the orders passed by the AO it transpired that the summons sent to Mr. Meattle at his last known address was received back unserved. The AO then requested the Deputy Director of Income Tax (Investigations), Bombay to trace Mr. Meattle asking him to attend the hearing before the AO for the propose of cross-examination. By a letter dated 12th February 1996, the ADIT (Investigation) informed the AO that Mr. Meattle could not be found. Another letter dated 19th February 1996 sent by the AO to the ADIT (Investigation) asking Mr. Meattle to attend the hearing before the AO on 27th February 1996 was replied back stating that Mr. Meattle could not be traced. Despite efforts by the AO, Mr. Meattle could not be traced and produced for his cross-examination. Accordingly, the AO then came to the conclusion that the Assessee was not interested in completing the proceedings. Accordingly, the AO decided to proceed with the reassessment.

15. For a second time, the CIT (A) dismissed the Assessee' appeals and that is how the Assessee again approached the ITAT with ITA Nos. 1515 to 1517/D/97. By the impugned order dated 8th May 2003, the ITAT dismissed the appeals. The summary of the ITAT's conclusions is as follows:

- (i) From the statements made by Mr. Meattle and Mr. Jhunjhunwala, it was clear that both of them were involved in the transactions inasmuch as whatever was stated by Mr. Meattle was confirmed by Mr. Jhunjhunwala. It could not be said that Mr. Jhunjhunwala was a

stranger to the transactions.

(ii) On a detailed analysis of the statements of Mr. Meattle and Mr. Jhunjhunwala, the ITAT concluded that Mr. Jhunjhunwala admitted to having been handed over by Mr. Jajodia the bearer cheques drawn on companies of Mr. Meattle and that he used to withdraw the said amount and handed it over to one Mr. Loknath who was introduced to him by Mr. Jajodia. While it could not be said that Mr. Jhunjhunwala drew support from Mr. Meattle, both had their independent roles to achieve one goal, i.e., to help the Assessee company to justify its claim before the Revenue authorities with respect to the payment of commissions which, according to Mr. Jhunjhunwala, were never paid.

(iii) By refusing to cross-examine Mr. Jhunjhunwala, the Assessee should be taken to have admitted the statements made by him to be correct. The statement made by Mr. Jhunjhunwala could be accepted in its entirety against the Assessee.

(iv) The Assessee having failed to cross-examine Mr. Meattle in the first round when the opportunity was granted, the Revenue could fall back on Section 33 of the Indian Evidence Act, 1872 (IEA) to use the evidence given by Mr. Meattle against the Assessee.

(v) The Assessee had failed to discharge the onus of showing that the payments of commission were genuine.

16. While admitting ITA No. 439 of 2003 on 27th March 2008, the Court framed the following questions of law for consideration:

“1. Whether the Income Tax Appellate Tribunal was correct in law in proceeding with the appeal filed by the Assessee in the absence of Mr. Meattle having been served or made available for cross- examination by the Assessee?

2. Whether the Income Tax Appellate Tribunal was correct in law in placing reliance on Section 33 of the Indian Evidence Act while denying an opportunity to the Assessee to cross-examine Mr. Meattle?”

17. The Court has heard the submissions of Mr. Ajay Vohra, learned Senior counsel for the Assessee and Ms. Lakshmi Gurung and Mr. P. Roy Choudhary, Standing counsel for the Revenue.

18. Mr. Vohra submitted that the Assessee was justified in declining to cross-examine Mr. Jhunhunwala since in the absence of Mr. Meattle, there would be no point in cross-examining Mr. Jhunhunwala. No adverse inference could be drawn against the Assessee on that score.

19. Mr. Vohra submitted that the ITAT erred in applying Section 33 of the IEA in the facts of the present case. According to him, one of the conditions for applicability of Section 33 of the IEA, viz., an opportunity to cross-examine Mr. Meattle, was not fulfilled. The ITAT itself had by the earlier order dated 24th December 1993 held that only one opportunity had been granted to the Assessee to cross-examine Mr. Meattle on 13th March 1990 and was, therefore, inadequate.

20. Mr. Vohra submitted that even otherwise there were inconsistencies and contradictions in the statements of Mr. Jhunhunwala and Mr. Meattle. Mr. Meattle, while explaining the *modus-operandi* of the bogus transactions of

payments of commission, had stated that Mr. Jhunjhunwala used to take blank cheques of his companies duly signed by him. However, Mr. Jhunjhunwala in his statement made on 15th March 1991 in a response to specific question (Question No. 3) denied that Mr. Meattle used to give him blank cheques. According to him, the cheques used to be handed over by Mr. Loknath Saraf of the Assessee. In reply to Question No. 23 of statement recorded on 30th November 1990, Mr. Jhunjhunwala claimed not to know the company, M/s. Bahri & Co. Pvt. Ltd. However, in reply to Question No. 31 on the very date, i.e., 30th November 1990 and Question No. 2 dated 15th March 1991 Mr. Jhunjhunwala admitted that he knew Mr. Meattle. The statements of Mr. Jhunjhunwala were neither truthful nor trustworthy. The Assessee had sought to cross-examine Mr. Meattle in order to confirm the identity of the person who used to give him blank cheques. In the voluminous correspondence between Mr. Meattle and the Assessee there was no reference to Mr. Jhunjhunwala. Further Mr. Meattle stated that Mr. Jhunjhunwala had drawn the cheques. However, Mr. Jhunjhunwala on being shown the photocopies of cheques denied that they were in his handwriting. Although he claimed to know Mr. Jajodia who was related to the MD of the Assessee, and had helped the Assessee in its bogus transactions without any vested interest, Mr. Jhunjhunwala was not assigned any remunerative work/assignment. This showed that Mr. Meattle and Mr. Jhunjhunwala were in collusion with each other in order to implicate the Assessee and to evade payment of taxes on the income earned by the companies of Mr. Meattle. According to him, these facts could have been unearthed only after the cross-examination of Mr. Meattle.

21. In support of the proposition that the denial of cross-examination of Mr. Meattle, whose statement formed the basis of the assessment proceeding, would result in violation of the principles of natural justice, reliance was placed on the decision of the Supreme Court in *Andaman Timber Industries v. Commissioner of Central Excise, Kolkata-II* (2015) 62 *taxmann.com* 3 (SC) and of this Court in *Commissioner of Income Tax v. Praveen Kumar Gupta* (2008) 303 ITR 95 (Del). Reliance was also placed on the decision of the Supreme Court in *Kishanchand Chellaram v. CIT* (1980) 125 ITR 713 (SC).

22. Ms. Gurung, learned counsel for the Revenue, on the other hand pointed out that sufficient opportunities had been granted to the Assessee for cross-examination of the witnesses whose statements were recorded in the assessment proceedings. The Assessee chose not to cross-examine Mr. Jhunjhunwala despite sufficient opportunities. In the circumstances, there was no question of any violation of the principles of natural justice.

23. As already noticed, this was second round of litigation before the ITAT. By an earlier order dated 24th December 1993, the ITAT had opined that the AO “should have granted some more time to Assessee to gather material needed for proper cross-examination of Shri Meattle.” The matter was restored to the AO to enable him to offer reasonable opportunity to the Assessee “to cross-examine the above two persons in accordance with law and then re-consider the claim of payment of commission.” It was to the above extent the impugned order was set aside and the matter was restored to the file of the AO for all the three AYs. It was made clear that other

grounds urged by the Assessee regarding validity of the assessment proceeding were not pressed during the course of the said appeals before the ITAT and these grounds were rejected.

24. When the matter was remanded to the AO, the case was posted for hearing on 6th September 1995 on which date the AO asked the authorized representative ('AR') of the Assessee to indicate the preparedness of the Assessee cross-examining both Mr. Meattle and Mr. Jhunjhunwala. The case was adjourned to 20th October 1995. However, on that date the letter was filed by the Assessee stating that they need 15 days time since the Director who was looking after the taxation work of the Assessee was out of station. This was acceded to and the case was fixed for 8th November 1995. On that date there was no response from the Assessee. On 29th January 1996 summons were issued to both Mr. Meattle and Mr. Jhunjhunwala requiring them to attend the hearing before the AO on 19th February 1996 for the purpose of their cross-examination by the Assessee. The Dy. Director of Income Tax (Investigation) (Headquarters), Bombay requested by a letter dated 29th January 1996 to trace the witnesses and to inform the AO if there had been any change in their addresses. Mr. Jhunjhunwala sent a letter dated 7th February 1996 expressing his inability to attend the hearing on 19th February 1996 and instead opted for 27th February 1996. On the adjourned date, 27th February 1996, he attended the hearing for cross-examination. In the case of Mr. Meattle, the summons sent at the last known address returned unserved. The ADIT (Investigation) Bombay by his letter dated 12th February 1996 stated that Mr. Meattle was not found in his premises as it was locked. A further letter was addressed to the DDIT on 19th February

1996 furnishing the last known address of Mr. Meattle.

25. By a letter dated 16th February 1996, the Assessee was asked by the AO to cross-examine the witnesses and to attend the proceeding on 27th February 1996. Three days prior thereto, i.e., on 23rd February 1996 the Assessee sent a letter requiring several documents so that there could be a meaningful cross-examination of the witnesses. The order sheet of the AO showed that on 27th February 1996 Mr. Jhunjhunwala attended the proceedings both at the stipulated hour, i.e., 11 am and 3 pm at which time Mr. Jajodia and Mr. Jain also attended the office. Mr. Jhunjhunwala filed a letter confirming his statements dated 30th November 1990 and 15th March 1991. When asked to cross-examine Mr. Jhunjhunwala, Mr. Jajodia stated that Mr. Jhunjhunwala was a stranger to the transactions involving Mr. Meattle and that without cross-examining Mr. Meattle there was no use in cross-examining Mr. Jhunjhunwala. When till 4 pm Mr. Meattle did not turn up, the AR of the Assessee stated that they could not wait longer and that they reserved their right to cross-examine Mr. Meattle and all of them left the office of the AO at 4.05 pm. The AO noted that the Assessee submitted another letter dated 8th March 1996 and 12th March 1996 again stating that the proposed disallowance of commission payment should be dropped in view of the non-furnishing of the financial statement, income tax return etc. of the three payee companies by the Department and also because Mr. Meattle did not attend the hearing. Meanwhile ADIT (Investigation) (Hqrs) by his letter dated 18th March 1996 again stated that Mr. Meattle could not be found at the address indicated by him to the ACIT by his letter dated 21st August 1995.

26. The AO realized that the proceedings would be barred by limitation on 31st March 1996 and therefore, the AO had no other options to complete the proceedings.

27. The question that arises is whether in the above facts it could be said that there was violation of the principles of natural justice. The further question that arises is whether there was non-compliance of orders passed earlier by the ITAT on 24th December 1993.

28. The Court is satisfied that as far as making Mr. Meattle available for his cross-examination is concerned, every effort was made by the Department to locate him. It could not be said that the failure to produce Mr. Meattle for cross-examination was deliberate. That does not appear to be any wilful disobedience of the order passed by the ITAT in that regard.

29. While there may be merit in the contention of Mr. Vohra that Section 33 of IEA may not strictly apply in the facts and circumstances of the present case, nevertheless the fact remains that Mr. Jhunjhunwala was an important witness. He had made incriminating statements against the Assessee and the Assessee chose not to counter it. Despite opportunities, the Assessee declined to cross-examine Mr. Jhunjhunwala. There have to be consequences as a result of the failure by the Assessee to avail of the above opportunities. In *A E G Carapiet v. A Y Derderian AIR 1961 Cal 359*, it was held that "wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed

at all." Here, the AO proceeded to draw an adverse inference and considered the statement made by Mr. Jhunjhunwala as substantive evidence against the Assessee. The above conclusion of the AO cannot be faulted.

30. While the wisdom of applying Section 33 of the IEA to the evidence of Mr. Meattle may be doubtful, the Court is of the view that *de hors* the evidence of Mr. Meattle, the evidence of Mr. Jhunjhunwala was by itself sufficient to draw an adverse inference against the Assessee that the payments of commission were fictitious. The Court is not persuaded to hold that Mr. Jhunjhunwala had made contradictory and inconsistent statements particularly since he was never confronted with those inconsistencies and contradictions by the Assessee. If, as is urged by the Assessee, Mr. Meattle's statements are to be entirely kept aside, then Mr. Jhunjhunwala's statements can be examined for their intrinsic worth. The Assessee took a calculated risk in declining to cross-examine Mr. Jhunjhunwala on the understanding that it had to be preceded by the cross-examination of Mr. Meattle.

31. Two conclusions that could be drawn from the above narration are that there is no violation of principles of natural justice as far as the Assessee is concerned, and the uncontroverted statements of Mr. Jhunjhunwala were sufficient to substantiate the case of the Revenue against the Assessee.

32. Consequently, the Court is unable to find any error having been committed by the ITAT in upholding the concurrent findings of the AO and the CIT (A) regarding disallowance of the commission payments claimed by the Assessee.

33. In sum, as far as ITA No. 439 of 2003 is concerned, Question (2) is answered in the negative i.e., in favour of the Assessee and against the Revenue. However, Question (1) is answered in the affirmative i.e. in favour of the Revenue and against the Assessee. The net result is that the conclusion reached the impugned order of the ITAT is affirmed and ITA No. 439 of 2003 is dismissed.

ITA No. 156 of 2014

34. ITA No. 156 of 2014 by the Revenue is directed against the order dated 7th September 2012 passed by the ITAT in ITA No. 569/Del/06 for the AY 1983-84. This is a penalty appeal where the Revenue aggrieved by the ITAT setting aside the penalty levied on the Assessee under Section 271 (1) (c) of the Act.

35. While admitting ITA No. 156 of 2014, the following question was framed for consideration by the Court by its order dated 18th December 2015:

“Was the ITAT correct in confirming the order of the CIT (A) deleting the penalty levied on the Respondent Assessee under Section 271 (1) (c) of the Act?”

36. A perusal of the order of the CIT (A) reveals that one of the reasons for the deletion of penalty was only that “the whole assessment, reassessment is based upon the statement of the two persons mentioned above and no opportunity was allowed in the penalty proceedings.” It was held that the penalty levied “without allowing opportunity to the company for cross-examination of both the persons are liable to be cancelled.” It was concluded that the explanation offered by the Assessee was *bonafide* and “the additions

made just on the statements of the two persons mentioned above does not amount to concealment or filing of inaccurate particulars of income.”

37. The conclusion of the CIT (A) that no opportunity was given to the Assessee to cross-examine “both the persons” is factually erroneous. From the above narration it is plain that despite specific opportunities having been afforded to the Assessee, it declined to cross-examine Mr. Jhunjhunwala. The very basis on which the CIT (A) proceeded in the matter was, therefore, erroneous.

38. As far as the ITAT is concerned, one factor that appears to have weighed with it was that the Assessee's quantum appeal had been admitted by this Court. It was therefore concluded that “the issue is debatable” and the penalty was accordingly not leviable. The mere pendency of the quantum appeal could not have led the ITAT to conclude that the issue was debatable.

39. It was contended by Mr. Vohra that it was necessary for the AO to offer Mr. Meattle and Mr. Jhunjhunwala for cross-examination even in the penalty proceedings. Further he submitted that the satisfaction arrived at by the AO in the original assessment order regarding initiation of the penalty proceedings was based on the statements of both Mr. Meattle and Mr. Jhunjhunwala. If the statement of Mr. Meattle is kept set aside, then the matter would have to be remanded to the AO for him to record his satisfaction *de novo* regarding initiation of the penalty proceedings only on the basis of the statement of Mr. Jhunjhunwala. He submitted that in the penalty proceedings a standard of proof higher than preponderance of probabilities was called for. Therefore, even if it were to be held that Mr.

Jhunjhunwala's statement could form the basis of the disallowance of the commission paid by the Assessee, it might not be sufficient to initiate penalty proceedings. Mr. Vohra submitted that the Assessee had disclosed all facts. There was a distinction to be drawn between making a 'wrong' claim and a 'false' claim and in the present case the Revenue had been unable to show that a false claim was made. Reliance was placed on the decisions in ***CIT v. Somnath Oil Mills (1995) 214 ITR 32 (Guj)***, ***MAK Data P. Ltd. v. CIT (2013) 358 ITR 593 (SC)***, ***Anantharam Veerasinghaiah v. CIT (1980) 123 ITR 457 (SC)***, ***Union of India v. Dharmender Textile Processors (2008) 306 ITR 277 (SC)***.

40. In reply, it is submitted by Ms. Gurung, learned counsel for the Revenue, that after the insertion of Explanation 1 to Section 271 (1), wilful concealment was not an essential ingredient for attracting penalty. She referred to the decision in ***Chairman, SEBI v. Shriram Mutual Fund 2006 (5) SCC 361*** where it is reiterated that the penalty under Section 271 (1) (c) of the Act was in the nature of a civil liability. This was reaffirmed by a larger Bench of the Supreme Court in ***Union of India vs. Dharmender Textile Processors (supra)***.

41. The Court first notes that on merits, the finding of the ITAT that no material was placed on record by the Assessee to demonstrate the nature of service rendered by the three companies to whom the commission was paid has been concurrently upheld by this Court. The Assessee indeed failed to discharge onus on proving the genuineness of those payments. The conclusion that the payment of commission was bogus has been

concurrently held by the CIT (A), by the ITAT and this Court.

42. Consequently, the essential conditions for attracting the penalty under Section 271 (1) (c) of the Act stand fulfilled in the present case. Further observed in **Union of India vs. Dharmender Textile Processors** (*supra*), the findings in the assessment (quantum) proceedings would be relevant and admissible in the penalty proceedings. The adverse inference against the Assessee for failing to cross-examine Mr. Jhunhunwala would equally apply to the penalty proceedings. There was no necessity to again offer the Assessee a further opportunity of cross-examining Mr. Meattle and Mr. Jhunhunwala in the penalty proceedings.

43. As already noted, the CIT (A) erred in proceeding to delete the penalty on the ground that the Assessee had been denied an opportunity of cross-examining both Mr. Meattle and Mr. Jhunhunwala. The ITAT erred in concluding that the mere pendency of the Assessee's quantum appeal made the issue a debatable one.

44. The Court rejects the plea of the Assessee that the matter should be remanded to the AO for arriving at a satisfaction *de novo* regarding initiation of penalty proceedings. In the facts of the present case, where the disallowance of the commission payment has been upheld by this Court, on account of the Assessee failing to furnish the true and correct particulars, the initiation of the penalty proceedings against the Assessee under Section 271 (1) (c) of the Act is perfectly justified.

45. The decision in **CIT v. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR**

158 (SC) proceeded on the basis that no information given in the return was found to be incorrect or inaccurate. It was in that context that it was observed that the mere making of an incorrect claim would not tantamount to furnishing inaccurate particulars. Here the question is not mere making of a wrong claim but in making a claim that is demonstrably false. With the Assessee failing to establish the genuineness to the commission payments the essential conditions for attracting penalty under Section 271 (1) (c) of the Act stood fulfilled.

46. The impugned orders of the ITAT and the CIT (A) deleting the penalty are hereby set aside. The penalty as ordered by the AO is restored. The question framed is answered in the negative, i.e., in favour of the Revenue and against the Assessee.

47. ITA No. 439 of 2003 is dismissed and ITA No. 156 of 2014 is allowed, but with no order as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

FEBRUARY 4, 2016

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