

FORM NO.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present:
Hon'ble Justice Girish Chandra Gupta
And
Hon'ble Justice Asha Arora

ITA 291 of 2009
COMMISSIONER OF INCOME TAX, KOLKATA - II
Versus
PILANI INVESTMENT & INDUSTRIES CORPORATION LTD.

Advocate for the Appellant: Mr. M. P. Agarwal, Adv.
Mr. P. Dudhoria, Adv.

Advocate for the Respondent: Mr. J. P. Khaitan, Sr. Adv.
Mr. Siddharth Das, Adv.
Mr. Asim Choudhury, Adv.

Hearing concluded on: January 20, 2016

Judgment delivered on: 02.02.2016.

GIRISH CHANDRA GUPTA J. The Revenue has come up in appeal u/s.260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') against the judgment and order dated 20th March, 2009 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') 'B' Bench, Kolkata in ITA No.1920 (Kol.) of 2008 for the assessment year 2005-06. The questions of law suggested by the revenue for consideration are as follows:-

“i) Whether, the mere disclosure of the amount of interest earned on the income-tax refund in the notes to accounts, without including the

same in the computation of the total income, constituted bona fide belief of the assessee that such interest income was not exigible to tax on actual receipt of the said income?

ii) Whether, the assessee in the instant case was justified in treating the interest received on income-tax refund as being contingent in nature, although there is no provision to that effect in the Income Tax Act 1961 and income is to be taxed either on accrual or receipt basis?

iii) Whether, the assessee in the instant case has furnished inaccurate particulars of income considering the judicial view that interest received on refund of income tax is liable to be taxed in the year of receipt notwithstanding the fact that quantum appeals are pending before the appellate authority?"

The facts and circumstances of the case briefly stated are as follows:-

During the financial year 2004-05 the assessee received interest amounting to Rs.101.45 lakhs with the amount of refund arising from orders passed by the Commissioner of Income Tax (Appeals) (hereinafter referred to as "CIT(A)") for the assessment years 1993-94 to 1996-97. The revenue appealed against the order of the CIT(A) before the Tribunal. Since the matter was subjudice the assessee did not include the income arising out of the aforesaid amount of interest in his profit and loss account but disclosed the same in the notes to the accounts. The assessment was done under Section 143(3) of the Act.

During the assessment proceedings the assessee was asked to justify the omission. In response the assessee furnished submissions dated 10th September 2007 wherein he stated that relevant disclosure

regarding the interest income had been made under clause 5 of Schedule 'H' titled 'Accounting Policies and Notes on Accounts' by way of the following note:-

"Based on the allowance of certain claims of CIT (Appeals), the Company has received interest of Rs.101.45 lacs from Income Tax Department for the assessment years 1993-94 to 1996-97. However, the department has gone into appeal against the above judgement and accordingly, the said interest income being a matter of contingency, has not been credited to the Profit and Loss Account."

The assessing officer rejected the explanation furnished by the assessee and by an order dated 21st December 2007 made an addition of Rs.101.45 Lakhs to the taxable income. Subsequently the assessing officer initiated penalty proceedings u/s.271(1)(c) of the Act. During the penalty proceedings the assessee submitted a written reply on 29th May 2008 stating that:-

" The reasons for not offering the same were bona fide...we bona fide believed that the said amount is taxable only when the proceeding for those years will attain finality and no penalty can be levied for that. The assessee explained that there are two ways of accounting an income or an expense. Either accept and adjust the same after each and every event or alternatively acknowledge it when there is no more, possibility of its alteration. The company has been following the practice of accounting the interest income or interest expense only after the matter is fully closed because before that the values keep on vary (increase/decrease) according to the judgements at different levels."

The assessing officer rejected the contention raised by the assessee and imposed penalty of Rs. 37.12 Lakhs vide order dated 27th June 2008 and observed as follows:-

"Therefore, penalty could be imposed both for the concealment of income as well as furnishing of inaccurate particulars of income. Though the assessee has disclosed the said interest income but failed to offer the said

interest income received during the year for taxation. It should be very clear that the proceedings under the I.T. Act are guided by the provisions of the I.T. Act, 1961 and are not based on the surmise of the assessee. It was the duty of the assessee to offer each and every kind of income for taxation and every effort whether bonafide or malafide for not including a certain part of income in the computation of income and failing to offer tax on it would attract penalty provision u/s.271(1)(c). Therefore A.O. was legally correct to initiate penalty proceedings as this is clear case of furnishing inaccurate particulars of income to reduce the tax burden of the assessee."

The assessee appealed before the CIT(A) against the aforesaid order imposing penalty. The CIT(A) by the order dated 18th August, 2008 allowed the appeal and set aside the order imposing penalty. The Revenue appealed before the Tribunal unsuccessfully and has now come up in appeal before this Court.

Mr. M. P. Agarwal, learned advocate appearing on behalf of the appellant/revenue contended as follows:-

- (a) That there was lack of bona fide on the part of the assessee;
- (b) That the fact that no appeal was preferred by the assessee against the order dated 21st December, 2007 by which the interest income was added goes to show that there was concealment of income;
- (c) That there is no requirement to prove mens rea in order to impose penalty u/s.271(1)(c) of the Act. The CIT(A) by the order dated 18th August, 2008 while holding in favour of the assessee had relied on Dilip N. Shroff v. JCIT reported in 291 ITR 513 which no longer holds the field in view of the judgment in UOI v. Dharmendra Textile Processors reported in (2008) 306 ITR 277. In Dharmendra Textile Processors (supra) their Lordships have held as follows:-

"The Explanations appended to Section 271(1)(c) of the IT Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in Dilip N. Shroff case [(2007) 6 SCC 329 : (2007) 8 Scale 304] has not considered the effect and relevance of Section 276-C of the IT Act. Object behind enactment of Section 271(1)(c) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276-C of the IT Act."

(d) That Section 271(1)(c) has to be read with clause (B) of Explanation 1 thereto which reads as follows:-

"Explanation 1.—Where in respect of any facts material to the computation of the total income of any person under this Act,—

(A)...

(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 subsection be deemed to represent the income in respect of which particulars have been concealed."

Had the assessing officer not conducted scrutiny assessment u/s.143(3) the interest income could never have been detected. Therefore the assessee had failed to substantiate his explanation and to prove that the same was bona fide. The assessee also failed to prove that he had disclosed all the facts

relating to and material to the computation of his total income. Therefore, in view of the deeming provision under Explanation 1, as aforesaid, the income would be deemed to have been concealed; and

- (e) That the omission on the part of the assessee in not disclosing the interest on refund received by him was not bona fide. Mere disclosure regarding the interest income in the notes of accounts was insufficient.

Mr. J. P. Khaitan learned senior advocate appearing for the assessee contended as follows:-

1) That the assessee acted in a bona fide manner and made the relevant disclosure on the issue under consideration in its financial statements for the assessment year 2005-06. Disclosure regarding the interest income received was made by way of a note under Clause -5 of Schedule – H titled ‘Accounting Policies and Notes on Accounts’ as would appear from the order of CIT(A) dated 18th August 2008. The assessee had submitted a written reply dated 29th May, 2008 (quoted above) wherein he stated the exact reason for not offering the interest on refund as income.

2) That the assessing officer by his order dated 27th June, 2008 imposing penalty has altogether failed to consider the mandate of Clause (B) of Explanation 1 to Section 271(1) by holding as follows:

“It was the duty of the assessee to offer each and every kind of income for taxation and every effort whether bonafide or malafide for not including a certain part of income in the computation of income and failing to offer tax on it would attract penalty provision u/s.271(1)(c).”

3) That both the CIT(A) and Tribunal have held that the assessee entertained a bona fide belief that the interest on refund was not

includible in the computation of total income and thus penalty could not have been imposed; and

4) That merely because the department rejects a claim made by the assessee the same cannot be a ground for imposing a penalty. In support of his submission he relied on the judgement of the Apex Court in the case of CIT -Vs- Reliance Petroproducts Pvt. Ltd. reported in (2010) 322 ITR 158 wherein their lordships held as follows:-

"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."

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. 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. 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."

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...

10. We are not concerned in the present case with 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."

11. 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 inaccurate particulars.

12. It was tried to be suggested that Section 14-A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form part of the total income. It was, therefore, reiterated before us that the assessing officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the assessing officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the legislature."

We have heard the rival contentions advanced by the learned advocates for the parties and perused the record.

The learned CIT(A) while allowing the assessee's appeal held as follows:-

"6. On perusing the above mentioned facts of the case, observations of Assessing Officer and arguments of the Appellant, following are my observations:

(i) The Assessing Officer has himself provided in the order that the Appellant has made disclosure of position taken in respect of treatment of interest on income tax refund as contingent in nature. The said disclosure substantiates the bonafide belief of the Appellant.

(ii) The observation of the Assessing Officer that penalty provisions are attracted irrespective of the fact whether an addition is based on bonafide or malafide belief cannot be accepted, since there are plethora of cases including judgements of Hon'ble Supreme Court in Cement Marketing Co of India Ltd (supra) and Hon'ble Jurisdictional High Court in Dhoolie Tea Co Ltd (supra) (already discussed above) that have decided that penalty could not be imposed where the assessee has bonafide belief that the view taken is correct. Accordingly, since the Appellant had a bona fide belief that the interest on income tax refund is contingent in nature and would crystallize in the year when the matter reaches finality, penalty could not be imposed.

(iii) On plain reading of the facts in the case of Avada Trading Co (P) Ltd (supra), it is clear that there was a conflict of opinion on the year of taxability of interest on income tax refund between two benches of Hon'ble Mumbai ITAT for which the Special Bench was constituted- Further, reliance is also placed on the decisions of Jurisdiction High Court in the case of CIT vs Jagabandhu Kumar Ruplal Sen Poddar [133 ITR 156] and CIT vs Bengal Jute Mills Co Ltd [174 ITR 402] deciding that penalty could not be imposed where two opinions were possible. Therefore, since the matter under appeal is similar to the matter in Avada Trading, it could be said that there were two possible views in Appellant's case.

(iv) Further, reliance is also placed on decision of Hon'ble Delhi ITAT in Nuchem vs DCIT [47 ITD 487], where it was held that penalty could not be imposed where the appellant did not offer the interest earned on fixed deposits made for providing guarantee to Excise Department in respect of excise duty under dispute adopting a position that the same is contingent in nature since decision of Hon'ble Delhi High Court is pending. The facts of the case are similar to the Appellant's case.

(v) Following the ratios of the above-mentioned judicial pronouncements and going by the facts of the assessee's case, it is not possible to agree with the observations of the A.O.. Plethora of case-laws on the issue including the judgement of the Apex Court in the case of Dilip N. Shroff vs Joint CIT (291 ITR 513) do not make the assessee's case

a fit case for imposition of penalty, under Section 271(1)(c) of the Income tax Act, 1961. The facts of the assessee's case do not constitute a deliberate act of "Suppressio veri or Suggestio falsi".

7. In view of the discussions made under paras 6(1) to 6(v) above, the penalty order is cancelled."

The learned tribunal upheld the order of the learned CIT(A) and held as follows:-

"5. Heard the rival contested submissions, went through the record. It is a fact that the assessee has acted bonafidely in this case. There is no condition of the provision of section 271(1)(c) with regard to the imposition of penalty for concealment. Neither there is furnishing of inaccurate particulars nor concealment of particulars by the assessee. Since the revenue has gone in further appeal against the refund of interest, the assessee did not treat the same as income because of its contingent in nature. Even otherwise since the matter is subjudiced it is not a realized or realizable income in the hands of the assessee without the disposal of the matter pending in appeal. It means that without finalization of appeal, the assessee cannot treat it to be an income. Therefore, the assessee's treatment on the same as contingent in nature cannot be outright rejected. We, therefore, endorse the view of the CIT(A) in allowing the assessee's appeal."

The relevant portion of section 271(1)(c) together with explanation reads as follows:-

"271. Failure to furnish returns, comply with notices, concealment of income, etc.-(1) If the Assessing Officer or the 1[* * *] Commissioner (Appeals) 2[or the Commissioner] in the course of any proceedings under this Act, is satisfied that any person-

(a) [omitted;]

(b) ...

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income 4[, or],

.

.
.
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 12[* *] Commissioner (Appeals) 13[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."

The assessing officer in his order imposing penalty dated 27th June 2008 has observed as follows:-

*"Therefore, penalty could be imposed both for the concealment of income as well as furnishing of inaccurate particulars of income. **Though the assessee has disclosed the said interest income** but failed to offer the said interest income received during the year for taxation."*

Hence the assessing officer himself admitted that the assessee had disclosed the said interest income. Disclosure and concealment cannot co-exist. When a finding is recorded that disclosure was indeed made then the conclusion as regards concealment is bad. Furthermore it cannot also be said that the assessee had furnished inaccurate particulars of income. This is so because there was no material on record to indicate that the particulars furnished by the assessee were factually

incorrect. As held in *Reliance Petroproducts* (supra) merely making a claim which is not sustainable in law by itself will not amount to furnishing inaccurate particulars regarding the income of the assessee.

The conditions precedent under clause (c) of section 271(1) is that the assessee should have concealed the particulars of his income or furnished inaccurate particulars. Mr. Agarwal contends that his case is covered by Explanation (B). In order to bring the case within Explanation (B) following conditions have to be fulfilled.

- (a) The assessee offers an explanation which he is not able to substantiate; and
- (b) The assessee fails to prove that such explanation is bona fide; and
- (c) The assessee fails to prove that all the facts relating to and material to the computation of his total income have been disclosed by him.

It may be true that the assessing officer did not accept the explanation offered by the assessee and made additions which the latter did not challenge in appeal but it is also true that the learned Tribunal in paragraph 5 of its judgement quoted above opined that “since the matter is subjudice it is not a realized or realizable income in the hands of the assessee”. In that view of the matter even the first condition was not satisfied. As regards the second condition there is concurrent finding of the CIT(A) and the Tribunal that the explanation was bona fide. This finding is not under challenge before us. It is not even alleged that the

assessee failed to prove that all the facts relating to and material to the computation of his total income were not disclosed by him. Thus, the requirements appearing from the explanation remain unfulfilled. As a result Section 271(1)(c) cannot operate against the assessee.

In order to determine as to what amounts to a bona fide explanation we may gainfully refer to the judicial pronouncements on what amounts to a bona fide defence in an application, for final judgement in a suit, under Chapter XIII A of the Calcutta High Court Rules (Original Side) which is in pari materia with Sub-rule 5 of Rule 3 of Order 37 of The Code of Civil Procedure, 1908.

In *Kiranmoyee Dassi -Vs- J. Chatterjee* reported in AIR 1949 Cal 478, the plaintiff had filed an application for final judgment under chapter XIII A of the Calcutta High Court Rules in a suit for recovery of possession, arrears of rent and mesne profits. After an extensive review of the authorities this Court culled out the following principles:-

"(a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a

state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence or the defence set-up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

In the case of *Mechele Engineers & Manufacturers v. Basic Equipment Corporation* reported in (1976) 4 SCC 687 the judgment in the case of *Kiranmoyee Dassi* was quoted with approval.

In our opinion the standard laid down in Clause (b) of the aforesaid judgement in *Kiranmoyee Dassi* (supra) for determining a bona fide defence is also applicable to the question whether the explanation offered by the assessee is bona fide for the purpose of Clause (B) of Explanation - 1 to section 271(1)(c) of the Act.

Therefore, the assessee cannot be held to have furnished inaccurate particulars or concealed particulars of his income. Hence, the imposition of penalty under Section 271(1)(c) was rightly set aside both by CIT(A) and the learned Tribunal.

In that view of the matter, the questions No.1 and 2 are answered in the affirmative and the question No.3 is answered in the negative and in favour of the assessee.

The appeal is, thus dismissed.

(GIRISH CHANDRA GUPTA J.)

I agree.

(ASHA ARORA, J.)