IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 678 of 2015

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THE PRINCIPAL COMMISSIONER OF INCOME TAX-2....Appellant

Versus

SHREE NEELKANTH CORPORATION... Respondent

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Appearance:

MRS MAUNA M BHATT, ADVOCATE for the Appellant

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 28/09/2015

ORAL ORDER

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. This appeal under section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), the appellant revenue has challenged the order dated 20.02.2015 made by the Income Tax Appellate Tribunal, Ahmedabad Bench "D" (hereinafter referred to as "the Tribunal") in ITA No.3076/Ahd/2013, by proposing the following question stated to be a substantial question of law.

> *"Whether the Appellate Tribunal has substantially erred in law in deleting the penalty of Rs.45,50,000/- levied u/s 271(1)(c) on undisclosed income of Rs.1,20,00,000/- without appreciating the fact that the assessee had offered the additional income for taxation only after it was detected by the department*

while conducting a survey operation u/s 133A(1) of the Income Tax Act?"

2. The respondent – assessee, a firm, filed its return of income for assessment year 2009-10 on 30.07.2009 declaring total income of Rs.20,10,190/-. During the course of survey, certain documents reflecting unaccounted income from the "Nakshatra" project were found and impounded, on the basis of which, Shri Ragesh Kumar P. Shah, the key person and partner of the assessee firm has disclosed additional income of Rs.1,20,00,000/- for the relevant year, which has not been recorded in the books of account and agreed to pay income tax thereon while recording his statement on oath during the survey action. In connection therewith, the assessee filed a revised return of income for relevant year on 28.09.2009 declaring total income of Rs.1,40,10,190/- and paid taxes accordingly. The Assessing Officer initiated proceedings under section 271(1)(c) of the Act on the ground that the assessee had furnished inaccurate particulars/concealed income of Rs.1,20,00,000/-. The Assessing Officer upon conclusion of the said proceedings, was of the view that the income of Rs.1,20,00,000/- as offered by the assessee in the revised return was filed only after the detection of unaccounted receipt of Rs.1,20,00,000/- as a result of survey action under section 133A of the Act and therefore, the same does not fall within the ambit of "voluntary disclosure". The Assessing Officer did not accept the plea of the assessee that no evidence was found of concealed income and held that the assessee had furnished inaccurate particulars of income to the extent of Rs.1,20,00,000/- and imposed penalty @ 101% of the tax sought to be evaded under section 271(1)(c) of the Act.

3. The assessee carried the matter in appeal before the Commissioner (Appeals), who upheld the order passed by the Assessing Officer and dismissed the appeal. The assessee carried the matter in further appeal before the Tribunal and succeeded.

4. Mrs. Mauna Bhatt, learned senior standing counsel for the appellant submitted that it was only pursuant to the survey carried out by the Income Tax Department under section 133A(1) of the Act, that the assessee had disclosed the income of Rs.1,20,00,000/-. Had it not been the survey action, no such disclosure would have been made and hence, the disclosure made by the assessee does not fall within the ambit of "voluntary disclosure". Reliance was placed upon the decision of the Supreme Court in the case of ***Mak Data Private Limited v. Commissioner of Income Tax-II***, *(2014) 1 SCC 674*, wherein the court had observed that the Explanation 1 to section 271(1)(c) of the Act raises a presumption of concealment, when a difference is noticed by the Assessing Officer, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. Voluntary disclosure does not release the assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty. The court held that the Assessing Officer should not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement" etc. to explain away its conduct. The question would be whether the assessee has offered any explanation for concealment of

particulars of income or furnishing inaccurate particulars of income. It was submitted that the above decision would be squarely applicable to the facts of the present case wherein, the disclosure made by the respondent – assessee is not voluntary, but only pursuant to the survey action carried out by the Department. It was, accordingly, urged that the matter requires consideration and the appeal deserves to be admitted on the question, as proposed or as may be formulated by this court.

5. The facts as emerging from the record show that the assessee had initially filed a return of income declaring total income of Rs.20,10,190/-. Subsequently, pursuant to a disclosure made during the course of survey, the assessee filed revised return of income for the relevant year declaring total income of Rs.1,40,10,190/- and paid taxes accordingly. The Assessing Officer while framing assessment under section 143(3) of the Act, accepted the income as filed in the revised return of income.

6. The Tribunal in the impugned order, has recorded that the revised return filed by the assessee was accepted in totality by the Assessing Officer and no addition was made. The Tribunal was of the view that considering the fact that the assessee had made the disclosure of income in the revised return of income and the Assessing Officer had also accepted the same, in view of the fact that the revenue had not found actual concealment of income or furnishing inaccurate particulars of income in the return of income, no penalty under section 271(1)(c) of the Act would be attracted.

7. The Supreme Court in the case of *Mak Data Private Limited v. Commissioner of Income Tax-II* (supra), has, in paragraph-10 thereof, held thus :

> “10. *We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded*

a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under section 271 read with section 274 of the Income Tax Act, 1961."

8. The Commissioner (Appeals) while upholding the order of the Assessing Officer, placed reliance upon the above decision of the Supreme Court. The learned counsel for the appellant has also strongly placed reliance upon the said decision.

9. From the observations made by the Supreme Court in the above decision as reproduced hereinabove, it is apparent that the court has observed that had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income.

10. Adverting to the facts of the present case, during the course of survey no undisclosed income was detected by the department. No incriminating material was found during the course of survey so as to prove that the assessee firm had earned undisclosed income. The assessee had voluntarily declared undisclosed income in relation to two assessment years and shown willingness to pay income-tax thereon. The assessee, accordingly, filed revised return of income declaring the income as stated during the course of survey, which came to be accepted by the Assessing Officer, without making any addition. Thus, it may be pursuant to the survey action, but the assessee did disclose the income in its revised return which was accepted by the Assessing Officer while framing

assessment under section 143(3) of the Act. Section 271(1)(c) of the Act provides that if the Assessing Officer is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct such person to pay penalty as prescribed thereunder. In the facts of the present case, neither the Assessing Officer nor the Commissioner (Appeals) has recorded any categorical finding as to what is the nature of concealment or the inaccurate particulars furnished by the assessee. As noticed earlier, the revised return filed by the assessee has been accepted by the Assessing Officer as it is. Evidently therefore, it cannot be said that any particulars of income had been concealed by the assessee while filing the said return, nor is there any finding that any inaccurate particulars of income were furnished. The Assessing Officer has invoked the provision of section 271(1)(c) of the Act on the ground that the disclosure made in the return was not voluntary. In this regard it may be noted that section 271(1)(c) of the Act does not include "involuntary disclosure" as one of the grounds for imposing penalty. Under the circumstances, no infirmity can be found in the impugned order passed by the Tribunal in setting aside the order of penalty.

11. In the absence of any legal infirmity in the impugned order passed by the Tribunal, it is not possible to state that the same gives rise to any question of law, much less, a substantial question of law so as to warrant interference. The appeal, therefore, fails and is, accordingly, dismissed.

(HARSHA DEVANI, J.)

(A.G.URAIZEE,J)

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