

In the High Court of Judicature at Madras

Dated: 12.8.2015

Coram:

The Hon'ble Mr.Justice **V.Ramasubramanian**  
and  
The Hon'ble Mr.Justice **T.Mathivanan**

Tax Case Appeal No.580 of 2015

The Commissioner of Income Tax,  
Chennai.

... Appellant

Versus

M/s. Tube Investments of India Ltd.,  
"Dare House"  
No.234, NSC Bose Road,  
Chennai - 600 001.

... Respondent

Tax Case Appeal filed under Section 260-A of the Income Tax Act,  
1961, against the Order passed by the Income tax Appellate Tribunal,  
Madras "D"Bench in I.T.A No.1920/Mds/2010 dated 9.9.2011.

For Appellant : Mr.T.Ravikumar

**JUDGMENT**

V.RAMASUBRAMANIAN, J

This appeal is by the Revenue, challenging a common order passed  
by the Income Tax Appellate Tribunal, Madras, "D" Bench, on an appeal and  
a cross appeal.

2. Heard Mr.T.Ravikumar, learned counsel for the appellant.

3. The respondent/Assessee filed its return of income tax for the

Assessment year 1998-99 on 30.11.1998 declaring a total income of Rs.1,46,86,704/- and a profit under Section 115J of Rs.4,04,28,085/-. The original assessment was completed on 27.3.2001. Subsequently, a reassessment under Section 143(3) read with 147 was completed on 27.3.2006. In the reassessment, certain additions were made.

4. As against 6 items of additions made in the reassessment, the assessee filed an appeal. The Commissioner of Income Tax (Appeals), by an order dated 30.3.2007, confirmed the order of reassessment in respect of 3 items namely (a) unaccounted lease syndication charges of Rs.1,66,00,000/- (b) unaccounted lease rent received from Wescare (India) Ltd., of Rs.1,20,00,000/- and (c) unaccounted lease syndication amount of DLWL Company of Rs.1,20,00,000/-.

5. As against the order of the Commissioner of Income Tax (Appeals), confirming only three additions and deleting three additions, the Revenue as well as the assessee filed further appeals to the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal dismissed the appeal of the assessee by an order dated 9.1.2009.

6. Thereafter, the Assessing Officer levied penalty under Section 271(1)(c), only on the issues confirmed both by Commissioner of Income Tax (Appeals) and Income Tax Appellate Tribunal. The levy of penalty was on the ground that the concerned additions came to be made on the basis of a reassessment order passed on the basis of a survey under Section 133A conducted by the Department in assessee's business premises.

7. As against the order of the Assessing Officer levying a penalty under Section 271(1)(c), the assessee filed an appeal to the Commissioner of Income Tax (Appeals).

8. By an order dated 19.8.2010, the Commissioner of Income Tax (Appeals) allowed the appeal partly. The effect of the said order of the Tribunal was (i) the deletion of the penalty in entirety, in so far as the addition relating to unaccounted lease syndication amount of DLWL Company of Rs.1,20,00,000/-; and (ii) the reduction of the penalty from 150% to 125% in so far as the other two items of addition are concerned.

9. Aggrieved by the total deletion of penalty in respect of one item, the Revenue filed an appeal in ITA No.1920/Mds/2010. As against the sustenance of the penalty to the extent of 125% in respect of other items of addition, the assessee filed an appeal in ITA No.1757/Mds/2010. The Tribunal dismissed both the appeals by a common order dated 9.9.2011. Aggrieved by the dismissal of their appeal, the Revenue has come up with the above appeal under Section 260-A of the Act.

10. Today, the Revenue has no quarrel with regard to the reduction of penalty from 150% to 125% in respect of two items of addition. The present appeal is confined only to the deletion of penalty in entirety in respect of one item. Therefore, the question of law arising for our consideration is: As to whether the Commissioner of Income Tax (Appeals) and the Tribunal were right in deleting the penalty proceedings in entirety, under Section 271(1)(c), when the assessee was not able to

substantiate the explanation offered by him, in the light of Explanation (1) (B) of Section 271(1)(iii)?

11. Placing reliance upon the decision of the Supreme Court in ***K.P.Madhusudhanan v. Commissioner of Income Tax [(2001) 251 ITR 99 (SC)]***, Mr.T.Ravikumar, learned Standing Counsel for the department contended that if the assessee could not prove, in the light of the circumstances stated in the explanation that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income and consequently liable to penalty. The learned counsel also invited our attention to the decision of the Supreme Court in ***Mak Data P.Ltd., v. Commissioner of Income Tax [(2013) 358 ITR 593 (SC)]*** and contended that even in cases where the assessee pleads voluntary disclosure, amicable settlement etc., to explain its conduct, a presumption of concealment is raised under the Explanation to Section 271(1). Therefore, the only question to be answered is as to whether the assessee offered any explanation for concealment of particulars of income or for furnishing inaccurate particulars.

12. We have carefully considered the above submissions.

13. It is true that under Clause (c) of sub-section (1) of Section 271, the Assessing Officer or Commissioner of Income Tax (Appeals) is entitled, in the course of proceedings under the Act, to levy a penalty, if any person has concealed the particulars of his income or furnished inaccurate particulars of such income. There are two ingredients to Clause (c). The first

is concealment of the particulars of income. The second is the furnishing of inaccurate particulars of such income.

14. What is concealment, is also explained to some extent in Explanation (1). Under this Explanation, there are three contingencies under the amount added or disallowed in computing the total income of a person shall be deemed to represent a concealed income. These contingencies are: (i) failure to offer explanation (ii) offering explanation that is found to be false and (iii) offering of an explanation, which could not be substantiated, coupled with the failure to prove that the explanation is bona fide and that all the facts relating to the same and material to the computation of income have been disclosed.

15. Therefore, it is up to the assessee to prove that his case does not fall under the category of concealment of income within the parameters of explanation (1).

16. That is in so far as the scope of Section 271(1)(c) is concerned. But what we are now concerned in this case is as to whether the power conferred upon the Assessing Officer or the Commissioner of Income Tax (Appeals) has been properly exercised or not. Section 271(1) goes as follows:-

*"If the Assessing Officer or the Commissioner of Income Tax (Appeals) or the Principal Commissioner or Commissioner, in the course of any proceedings under this Act, is satisfied that any person....."*

Therefore, an element of discretion is conferred upon the Assessing Officer

as well as Commissioner of Income Tax (Appeals) under Section 271(1). The discretion conferred is not uncontrolled or unguided. It is guided by certain parameters found in the Explanation (1).

17. Therefore, in an appeal arising under Section 260-A, this Court is concerned only with the question of law as to whether the exercise of discretion by the Assessing Officer or the Commissioner of Income Tax (Appeals) was proper or not.

18. For the deletion of the penalty in entirety in respect of one item of addition, the Commissioner of Income Tax (Appeals) gave cogent and convincing reasons in para 6.4.1 of his order dated 19.8.2010. Para 6.4.1 of the order of the Commissioner of Income Tax (Appeals) reads as follows:-

*"6.4.1 Based on the facts submitted by the appellant, I am of the considered opinion that only because the appellant has not substantiated the relationship of DLWL with the M/s. Arun Pipes Ltd. or because no confirmation was filed by M/s. Arun Pipes Ltd. regarding payment by DLWL on its behalf, no penalty could be levied. There is no dispute regarding receipt of Rs.1.2 Cr. from DLWL. There is also no dispute that Rs.1.2 Cr. was due from M/s. Arun Pipes Ltd. Hence, the imposition of penalty is on certain assumption ignoring the receipt of money by cheque which has been confirmed by the issuer of the said cheque. In such a situation, the addition may be sustained due to insufficient evidence. But since assessment and penalty proceedings are separate, the aforesaid reason alone would not warrant levy of penalty. Hence, appeal on*

*ground no.4 is allowed and the AO is directed to modify the penalty order passed accordingly."*

19. The Tribunal found the reasonings given by Commissioner of Income Tax (Appeals) in para 6.4.1 of his order to be valid both on facts and in law. As a matter of fact, the Tribunal took note of the confirmation of penalty in respect of two other items, at the rate of 125% and held on a cumulative consideration that the satisfaction to be arrived at by the Commissioner of Income Tax (Appeals) was properly arrived at.

20. Therefore, our answer to the question of law raised in this appeal would be that when the Commissioner of Income Tax (Appeals) is satisfied, on the basis of clear and cogent reasonings given in his order, not to levy penalty and when the Tribunal finds such satisfaction on the part of the Commissioner of Income Tax (Appeals) to have been correctly arrived at, the orders do not suffer from any error of law. Therefore, we hold that the Commissioner of Income Tax (Appeals) and the Tribunal were right in ordering deletion of penalty in respect of one item of addition, on the ground that the assessee's explanation was not only bona fide but also substantiated in terms of Explanation (1)(B) of Section 271(1)(iii) of the Act. Hence, the appeal is dismissed.

(V.R.S., J) (T.M., J)  
12.8.2015

Index : Yes or No  
Internet : Yes or No

To  
Income tax Appellate Tribunal, Chennai.

**V.RAMASUBRAMAN, J**

**AND**

**T.MATHIVANAN, J**

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T.C.(A) No.580 of 2015

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