IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

ON THE 20th DAY OF JULY, 2022

BEFORE

HON'BLE MRS. JUSTICE SABINA

&

HON'BLE MR. JUSTICE SATYEN VAIDYA

INCOME TAX APPEAL No.13 of 2016

RESERVED ON: 11.07.2022

PRONOUNCED ON:20.07.2022

Between:-

PR. COMMISSIONER OF INCOME TAX, SHIMLA. ….APPELLANT

(BY MR. VINAY KUTHIALA, SENIOR ADVOCATE WITH MS. VANDANA KUTHIALA, ADVOCATE)

AND

M/S J.M.J. ESSENTIAL OIL COMPANY, PLOT NO.39, I.A., TAHLIWAL, DISTRICT UNA. ….RESPONDENT

(BY MR. B.C. NEGI, SENIOR ADVOCATE WITH MR. SHAURYA KAUSHIK, ADVOCATE)

This Appeal coming on for hearing this day, ***Hon'ble Mrs. Justice Sabina,*** *delivered the following:*

J U D G M E N T

Appellant-Revenue has filed the appeal challenging the order dated 25.08.2015, passed by the Income Tax Appellate Tribunal (hereinafter referred to as the *'Tribunal'* in short), Division Bench, Chandigarh, whereby appeal filed by the respondent was allowed.

2. Respondent was running the business of manufacturing of essential oil, commercially known as Musk/Attars Heena special and sales thereof. Assessee-respondent had filed its return claiming deduction of Rs.85,31,46,762/- under Section 80 IC of the Income Tax Act, 1961 (hereinafter referred to as the *"Act"* in short). The case was taken up for scrutiny assessment and it was found that the respondent had shown cash sales of rupees three crores and Valued Added Tax (VAT) of rupees twelve lacs was remitted to Sales Tax Authorities on the cash sales made only during the month of September, 2006 to different parties. The Assessing Officer asked the respondent to justify the cash sales and give

complete addresses of the parties to whom the sales had been made.

3. The respondent-assessee, in its reply, submitted as under:-

> *(i) We, as a policy of the firm do not encourage nor entertain 'over the counter sale' due to administrative difficulties involved in collecting cash and other security reasons associated with the same. However, due to extreme demand and to catervarious traders/end users who have been constantly knocking our manufacturing facility at Una requesting us to supply smaller retail quantity not exceeding 50 kgs for sale at retail counter, we have agreed to sell our captioned product across counter to traders/end users who have approached us for supply of this unique and distinctive synthetic essence PAN SHAMAMA directly on cash basis.*
>
> *(ii) The decision to sale on cash basis across the counter was largely aimed on developing bigger consumer base so that we get repetitive orders from the prospective buyers. Keeping this objective before us as an exception and deviation to our policy of not to ale our manufactured goods on "cash basis on sale across the counter", we manufactured*

synthetic essence PAN SHAMAMA for retail counter sale on test market basis.

(iii) *We have manufactured and sold across the counter on cash basis 2.5 tons of PAN SHAMAMA at a sale price of 12,000/- per kg subject to local VAT of 4% which was collected from the buyers. We would like to reiterate that we have supplied to various buyers/ end users who came to us to procure PAN SHAMAMA for further use and recorded their names, addresses as given by the buyers without any access to verification whether the addressees given by them is correct and complete.*

(iv) *Further, since there is no restrictions or any statute from selling "over the counter" to buyers against cash, we believed and relied upon the address as given by the buyers and have prepared the sale invoice, as per the information given to us during September 2006, the details of which are enclosed herewith. We confirm that our finished gods namely PAN SHAMAMA have been sold to various buyers who have approached us at our manufacturing facilities at Una using their own transportation. The goods have been supplied in M.S. Drum of 25 kgs. We have also collected VAT @ 4% from the buyers and*

remitted the same to the Sales Tax Authorities, Una.

(v) *We also wish to state that the buyers address and other information mentioned in the respective bill as per details given by them and we do not have any further information regarding their telephone number and proof of address to establish the identity of the buyers. Since these sales were effected in the normal course of business, we have no reasons to disbelieve nor doubt the correctness of the information given by the buyers.*

(vi) *It is not out of place to mention that the quantity we have sold across the counter aggregating 2.5 tons represents 3% terms of both value and in terms of quantity."*

4. The Assessing Officer found that the respondent had introduced its unaccounted income in the garb of cash sales. The cash sales had been shown only in the month of September, 2006 and not prior to the said period or thereafter. The parties to whom cash sales had been allegedly made could not be traced at the addresses given by the respondent. The cash bills were of specific amount of rupees six lacs and rupees three lacs only. The amount of cash sales credited to the Books of Account were transferred to the accounts of the partners as

cash withdrawals in the month of September, 2006 itself. Thus, the respondent had failed to establish genuineness of cash sales amounting to Rs.3,12,00,000/- including VAT. Hence, the Assessing Officer, vide order dated 13.03.2012, imposed penalty to the tune of Rs.1,06,04,880/- on the respondent.

5. Appeal filed by the respondent against the said order dated 13.03.2012, was dismissed by the Commissioner of Income Tax (Appeals), Shimla, vide order dated 22.10.2012. However, the appeal filed by the respondent against the order dated 22.10.2012, passed by the Commissioner of Income Tax (Appeals), was allowed by the Tribunal vide impugned order dated 25.08.2015. Hence, the present appeal by the appellant-revenue.

6. At the time of admission of appeal on 01.11.2016, following substantial question of law was framed:-

> *"Whether the Hon'ble ITAT has erred in deleting the penalty levied u/s 271(I)(C), despite the fact that assessee has furnished inaccurate particulars of income in the garb of fictitious cash sales and thereby claimed exemption u/s 80-IC?"*

7. Mr. Vinay Kuthiala, learned Senior Counsel assisted by Ms. Vandana Kuthiala, learned Counsel for the appellant, has submitted that the Tribunal had erred in allowing the appeal. The respondent had shown fictitious cash sales and had claimed exemption under Section 80 IC of the Act. The addresses of the purchasers given by the respondent were not found correct on an inquiry. The purchasers could not be traced as the addresses given in the bills were incomplete and incorrect. Merely because VAT had been paid on the cash sales, did not establish the fact that the sales were genuine. By payment of meager amount of 4% VAT, the respondent had brought tax exempt funds of rupees three crores into its books. The stocks maintained by the respondent did not tally with the raw material, *vis-a-vis,* the production. Since the respondent had furnished inaccurate particulars of income eligible for exemption under Section 80 IC by claiming fictitious cash sales, it was a clear case of fabrication of accounts and the penalty had been rightly imposed on the respondent by the Assessing Officer.

8. Mr. B.C. Negi, learned Senior Counsel assisted by Mr. Shaurya, learned Counsel for the respondent-assessee,

has opposed the appeal and has submitted that the respondent had duly disclosed the cash sales in the accounts. The sale bills were supported by Sales Tax Paid Challans and Sales Tax Return filed by the respondent. The Books of Account had been accepted by the Sales Tax Authorities (VAT Authorities). Since the cash sales had been accepted by the Sales Tax Authorities, the respondent was not liable to pay any penalty. There was no element of fraud or suppression of facts with intend to evade payment of tax. Merely because the appeal filed by the respondent challenging the order dated 24.12.2009 passed by the Assessing Officer, holding that the respondent had failed to explain the cash sales in question, would not *ipso facto* make out a case for awarding penalty to the respondent. So far as penalty provisions are concerned, the same could have been invoked only where the case falls within the provisions of Section 271(1) (c)(d)(iii) and Explanation-1.

10. In support of his arguments, Mr. B.C. Negi, learned Senior Counsel, has placed reliance on a decision rendered by the Hon'ble Supreme Court in case titled ***"Union of India and Others*** *versus* ***Dharamendra Textile Processors and Others",*** reported in **(2008) 13 SCC 369,** wherein, it was held as under:-

*"**2.** A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. (2007 (8) SCALE 304). The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the `Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the `IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty.*

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18. The Explanations appended to Section 272(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 Dilp N. Shroof's case (supra) has not considered the effect and relevance of Section 276C of the I.T. Act. Object behind enactment of Section 271 (1)(e) 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. Willful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the I.T. Act."

11. Learned Senior Counsel, has further placed reliance on a decision rendered by the Hon'ble Supreme Court in case titled ***"Commissioner of Income Tax, Delhi*** *versus* ***Atul Mohan Bindal",*** reported in **(2009) 9 SCC 589,** wherein, it was held as under:-

"9. Section 271(1)(c) as was operative during the relevant year reads thus:
"271. Failure to furnish returns, comply with notice, 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-

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

he may direct that such person shall pay by way of penalty,-

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(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed (three times), the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

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 Commissioner (Appeals) 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.

A close look at Section 271(1) (c) and Explanation (1) appended thereto would show that in the course of any proceedings under the Act, inter alia, if the Assessing Officer is satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income, such person may be directed to pay penalty.

10. The quantum of penalty is prescribed in Clause (iii). Explanation 1, appended to Section 271 (1) provides that if that person fails to offer an explanation or the explanation offered by such person is found to be false or the explanation offered by him is not substantiated and he fails to prove that such explanation is bona fide and that all the facts relating the same and material to the computation of his total income has been disclosed by him, for the purposes of Section 271(1)(c), the amount added or disallowed in computing the total income is deemed to represent the concealed income. The penalty spoken of in Section 271(1)(c)

is neither criminal nor quasi criminal but a civil liability; albeit a strict liability. Such liability being civil in nature, mens rea is not essential.

11. In Union of India and Ors. vs. Dharamendra Textile Processors and Ors3, a three judge Bench of this Court held that Dilip N. Shroff did not lay down correct law as the difference between Section 271(1)(c) and Section 276(c) of the Act was lost sight of. The Court held that the explanation appended to Section 271(1)(c) indicates element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The Court held thus: (Dharamendra Textile case, SCC 394, para 18):

"18. The Explanations appended to Section 271(1)(c) of the Income Tax Act, 1961, indicate the elements of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The judgment in Dilip N. Shroff case (supra) has not considered the effect and relevance of Section 276-C of the I.T. Act. The object behind the enactment of Section 271(1)(c) read with Explanations indicates that the Section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Willful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276-C."

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14. Having thoughtfully considered the matter, in our judgment, the matter needs to be reconsidered by the High Court in the light of the decisions of this Court in Dharamendra Textiles and Rajasthan Spinning and Weaving Mills. In the result, appeal is allowed and the judgment of the High Court of Delhi passed on January 25, 2008 is set aside. The matter is remitted back to the High Court for fresh consideration and decision as indicated above. Since the assessee has not chosen to appear, no order as to costs."

12. Learned Senior Counsel, has further placed reliance on a decision rendered by the Hon'ble Supreme Court in case titled ***"Union of India** versus **Rajasthan Spinning and Weaving Mills",*** reported in **(2009) 13 SCC 448,** wherein, it was held as under:-

"19. In a case of non-payment, short-payment or erroneous refund of duty normally three issues are likely to arise relating to (i) recovery, (ii) interest and (iii) penalty. The three issues are dealt with under Section 11-A (Recovery of duties), Section 11AA (Interest for the period from three months after the determination of duty payable till the date of payment of duty), Section 11 AB (Interest for the

period from the first day of the month succeeding the month in which duty was payable till the payment of duty) and section 11AC (Penalty for short levy or non levy of duty).

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21.From sub-section 1 read with its proviso it is clear that in case the short payment, non payment, erroneous refund of duty is unintended and not attributable to fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the rules made under it with intent to evade payment of duty then the Revenue can give notice for recovery of the duty to the person in default within one year from the relevant date (defined in sub section 3). In other words, in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. But in case the non-payment etc. of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priory the period for which duty can be demanded gets extended to five years.

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26. The other provision with which we are concerned in this case is Section 11 AC relating to penalty. It is as follows:

"11-AC. Penalty for short-levy or non-levy of duty in certain cases.- where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of Section 11-A, shall also be liable to pay a penalty equal to the duty so determined:

[Provided that where such duty as determined under sub-section (2) of Section 11-A, and the interest payable thereon under Section 11-A, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been

paid within the period of thirty days referred to in that proviso:

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court , then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect.

Explanation. - For the removal of doubts, it is hereby declared that-

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of Section 11-A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(2) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person."

The main body of sub-section 1 lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.

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30. At this stage, we need to examine the recent decision of this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam,J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner.

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32. After referring to a number of decisions on interpretation and construction of statutory

provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows: (Dharamendra Textile case SCC 394, Paras 19-20):

"19. In Union Budget of 1996-97, Section 11-AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"20. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered."

From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11-AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11-AC in the manner as suggested because in that case that was not even the stand of the Revenue.

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34. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11-AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11-A. That is what Dharamendra Textile decides. It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far as Section 11-AC is concerned. We make no observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision."

13. The question that requires consideration in the present case is as to whether penalty could have been imposed on the respondent under Section 271(1)(c) on the ground that the respondent had furnished inaccurate particulars of his income in the garb of fictitious cash sales with a view to claim exemption under Section 81-IC of the Act. The Assessing Officer while examining the return filed by the respondent with

respect to Financial Year 2006-2007 (Assessment Year 2007-2008) under Section 143(3) of the Act, vide order dated 24.12.2009, held that respondent had failed to explain the cash sales amounting to Rs.3,12,00,000/- effected in the month of September, 2006. The said order has been admittedly upheld upto the Hon'ble Supreme Court vide order dated 23.08.2019. Appeal filed by the appellant was dismissed by this Court vide order dated 5th November, 2018. Penalty proceedings with regard to inaccurate cash sales set up by the respondent were separately initiated. It was observed by the Assessing Officer as well as the Appellate Authority (Commissioner of Income Tax (Appeals) that the respondent had claimed cash sales amounting to Rs.3,12,00,000/- only for the month of September, 2006. No such cash sale was ever set up prior to or after the month of September, 2006. The cash sales were duly scrutinized and it was found that in some bills the complete particulars of the purchasers had not been given. The addresses mentioned on the cash bills were found to be incorrect on an enquiry. Merely because the respondent had got order from the VAT Authority, did not in itself make the cash sales genuine. By paying a sum of twelve lacs by way of VAT

on cash sales within the State, the respondent had credited cash to its Books to the tune of Rs.3,12,00,000/-. The cash bills were of specific amount of rupees six lacs and rupees three lacs only and the amount had been transferred to the accounts of partners as cash withdrawals in the month of September, 2006 itself.

14. Thus, the Assessing Officer as well as the Appellate Authority, after examining the facts of the case, came to a finding that it was a clear case of fabrication of accounts by the respondent and the respondent was liable to pay penalty under Section 271(1)(c) of Income Tax Act, 1961. The finding of fact arrived by the Assessing Officer as well as the Appellate Authority, has been set aside by the Tribunal mainly on the ground that the respondent had substantiated its explanation by sale bills, sale tax Challan and sale tax order passed by the VAT Authorities. Thus, the Tribunal was mainly influenced by the fact that as the VAT authority had accepted the cash transactions in question, the cash sales put up by the respondents were genuine. However, we are of the opinion that merely because the VAT Authorities had accepted the cash sales set up by the respondent in itself, is not a sufficient

ground to hold that the cash sales set up by the respondent were genuine. The Assessing Officer was liable to independently look into the cash sales to come to a conclusion as to whether the said sales were genuine or not.

15. In view of the peculiar facts and circumstances of the case, the Assessing Officer as well as the Appellate Authority, rightly gave finding of fact that the cash sales put-forth by the respondent were not genuine and the respondent had introduced its unaccounted income in the garb of cash sales. The Tribunal erred in deleting the penalty levied under Section 271(1)(c) of the Act despite there being sufficient material on record to show that the cash sales set up by the respondent were fabricated and not genuine.

16. There is no quarrel with the preposition of law settled by the judgments relied upon by learned Senior Counsel for the respondent, but the same fail to advance the case of the respondent as these judgments are based on different facts.

17. After carefully going through the totality of circumstances, we are of the considered opinion that the order passed by the Tribunal is liable to be set aside as the penalty levied under Section 270(1)(c) of the Act against the

respondent was liable to be upheld in view of inaccurate particulars of income furnished by the respondent in the garb of fictitious cash sales with a view to claim exemption under Section 80-IC of the Act. The substantial question of law stands answered accordingly.

18. Consequently, the appeal is allowed. The impugned order dated 25.08.2015, passed by the Income Tax Appellate Tribunal, Division Bench, Chandigarh, is set aside.

19. Pending miscellaneous application(s), if any, shall also stand disposed of.

(Sabina)
Judge

(Satyen Vaidya)
Judge

July 20, 2022
(Yashwant)