IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 22 OF 2000

1. Mr. Shanti Ramanand Sagar }
son of Late Dr. Ramanand Sagar }
residing at Sagar Bhavan, }
Road No. 12-A, JVPD, }
Mumbai 400 049 }
}
2. Mr. Anand Ramanand Sagar }
son of Late Dr. Ramanand Sagar }
residing at Sagar Vila, }
Road No. 12-A, JVPD, }
Mumbai 400 049 }
}
3. Mr. Prem Ramanand Sagar }
son of Late Dr. Ramanand Sagar }
residing at Sagar Vila, }
Road No. 12-A, JVPD, }
Mumbai 400 049 }
}
4. Mr. Moti Ramanand Sagar }
son of Late Dr. Ramanand Sagar }
Residing at 6, New Shantivan }
Building, Oberoi Complex, }
Sab TV Lane, Andheri (W), }
Mumbai 400 053 }
}
5. Mrs. Sarita Choudhari }
Married Daughter of }
Late Dr. Ramanand Sagar, }
residing at B-29, Greater }
Kailash I, New Delhi. }
}
6. Mr. Jyoti Subash Sagar }
Grandson of Late Dr. Ramanand }
Sagar having his office at 1401, }
A/1, Aston Building, Sundarvan }
Complex, Lokhandwala Road, }
Andheri (West), Mumbai 400 053 } Applicants

versus

**Commissioner of Income-Tax } Mumbai } Respondent**

Ms. Aarti Sathe with Ms. Garima Kapoor for the applicants.

Mr. P. C. Chhotaray for the respondents.

**CORAM :- S. C. DHARMADHIKARI & PRAKASH. D. NAIK, JJ.**

**Reserved on 25th September, 2017**
**Pronounced on 17th November, 2017**

**JUDGMENT** :- (Per S. C. Dharmadhikari, J.)

1. This reference is at the instance of the assessee. The assessee sold a movie, namely, "Charas" to M/s. Prakash Pictures on minimum guarantee basis for Rs.13,70,000/-. The assessment year in this case is 1977-78. Since the assessee had shown only Rs.3,90,917/-, the assessment was reopened under section 147(a) of the Income Tax Act, 1961. In response to the notice under section 148 of the Act, the assessee returned an income of Rs.4,98,530/- as against the earlier returned loss of Rs.6,93,200/-. The Assessing Officer observed that the addition of Rs.9,79,083/-, made on account of minimum guarantee realisation was upheld by the AAC and the addition was accepted by the assessee. In view of these facts, penalty of Rs.6,46,588/- was levied under section 271(1)(c) of the Act.

2. The Commissioner of Income Tax (Appeals) cancelled this penalty on the ground that since the assessee had shown the balance income in his return for assessment year 1978-79 which was filed on 20th January, 1979, there was no concealment. However, on further appeal, the Tribunal restored the penalty.

3. The Tribunal assigned reasons and for restoring the penalty. The Tribunal held that non-availability of the agreement does not mean that the nature of the transaction cannot be disclosed. If the assessee had declared a loss, he thwarted his tax liability for two years by not declaring the entire receipts in the assessment year 1977-78. The tribunal recorded a finding that even after the set-off of brought forward losses, the current year's loss would have been converted into positive income with the inclusion of the balance receipt of the minimum guarantee amount. By declaring the balance amount in the subsequent year, the assessee certainly furnished inaccurate particulars of income for the year under appeal and either avoided or deferred his tax liability.

4. It is in these circumstances that the tribunal also rejected Miscellaneous Application No. 198/M/98 seeking a rectification of the finding of the tribunal that the losses could have been converted into positive income with the inclusion of balance

receipt of the minimum guarantee amount. This miscellaneous application was rejected on 1st February, 1999.

5. That is how the tribunal was moved by the assessee seeking a reference of certain questions terming them as questions of law for answer and opinion of this court. That is how the tribunal passed an order on 25th June, 1999 and referred the following questions for this court's opinion and answer.

> "1. Whether on the facts and in the circumstances of the case the Tribunal was right in law in reversing the order of the CIT(A) and confirming the levy of the penalty U/s. 271(1)(c) of the I. T. Act when factually the assessee's income was a loss for both the assessment years i.e. assessment year 1977-78 and assessment year 1978-79.
>
> 2. Whether on the facts and in the circumstances of the case there was any evidence before the Tribunal to justify in law in confirming the levy of the penalty on I. T. U/s. 271(1)(c) of the Income-Tax Act."

6. Ms. Sathe appearing for the assessee would submit that the first question, which is referred for answer and opinion of this court is answered by a judgment in the case of *Commissioner of Income-Tax vs. Gold Coin Health Food P. Ltd.*[1]. This is a Hon'ble Supreme Court decision and therefore, we should not answer this question.

7. As far as the second question, which is reproduced above, Ms. Sathe would submit that we must peruse firstly the Assessing

1 **(2008) 304 ITR 308**

Officer's order and at page 8 of the paper book. She would submit that the assessee did not have the nature of the income. In other words, the nature of the income was not known. The amount was treated as a deposit by the assessee. This was because the assessee was not sure whether the film would do well or otherwise. There is absolutely no question of concealment because the assessee may treat the amount as an advance or a minimum guarantee. There was no difference, inasmuch as the question was not of thwarting any liability, but ascertaining the exact nature of the income. In any event, as the assessee says that this was not a deliberate or intentional act, it is held so by the Commissioner of Income Tax (Appeals). He had rightly come to the conclusion that what was shown as deposit from M/s. Prakash Pictures was shown as income in the return for assessment year 1978-79 filed on 20th January, 1979. The re-opening of the assessment for the present year is on the basis of an audit objection dated 9th July, 1981. The assessee had a sizable carried forward loss as already assessed so that whichever way the assessee viewed this issue, there would be a negative income to be returned. The assessee, therefore, did not benefit in any manner by showing a part of this income as the income of the next year. This was declared by the assessee before any detection of the omission. The Commissioner of Income Tax (Appeals) also found

from the record that the order was passed under section 264 for assessment year 1978-79, in which the income originally assessed on the basis of the earlier return of the assessee has been reduced by the same amount by which the income to this assessment year has been increased and treated as concealed income.

8. Ms. Sathe would invite our attention to pages 14 and 15 of this paper book to submit that there was at best a technical default which neither resulted in any benefit to the assessee nor was there any loss to the Revenue. Hence, this was not a case where the penalty could have been imposed.

9. Ms. Sathe then submitted that the Tribunal has committed a patent error in holding that there was a part declaration by the assessee of his liability. There was, thus, an attempt to thwart the tax liability and show it for two years, namely, assessment year 1977-78 and 1978-79. Therefore, she would submit that the observations in para 7 of the Tribunal's order are erroneous. Thus, Ms. Sathe would submit that there was no evidence to justify the imposition of penalty. The ingredients of the provision were not at all attracted much less satisfied.

10. Ms. Sathe relied upon the following judgments and decisions in support of her arguments:-

(i) Commissioner of Income Tax vs. manilal Tarachand, (2002) 254 ITR 630;

(ii) Commissioner of Income Tax vs. Gold Coin Health Food P. Ltd., (2008) 304 ITR 308;

(iii) Commissioner of Income Tax vs. Reliance Petroproducts Pvt. Ltd., (2010) 322 ITR 158;

(iv) Price Waterhouse Cooppers Pvt. Ltd. vs. Commissioner of Income Tax and Anr., (2012) 348 ITR 306.

11. On the other hand, Mr. Chhotaray appearing on behalf of the Revenue would submit that the penalty has been rightly imposed. He would submit that it was imposed for non-disclosure/non-filing of materials and relevant particulars. There is no question of any *mens-rea*. Mr. Chhotaray would, therefore, submit that if one peruses the order passed by the Assessing Officer, it is evident that he concluded that there was no disclosure about the minimum guarantee. Mr. Chhotaray then invites our attention to page 30 of the paper book and submits that Ms. Prakash Pictures said that it paid Rs.13,70,000/-, whereas the respondent assessee is disclosing only Rs.3,90,917/-. There is absolutely no material by which the authorities could conclude as to why there was no disclosure of the income in the assessment year 1977-78. Mr. Chhotaray would submit that both

acts, namely, furnishing inaccurate particulars of income or concealment of income attract penalty. Mr. Chhotaray emphasises that the assessee did not act bonafide. The Revenue had to resort to the power to re-open the assessment to bring the amount to tax. Mr. Chhotaray invited our attention to section 4(1) of the Income Tax Act, 1961 to submit that there is no liberty to manipulate but there is a positive obligation to disclose all particulars.

12. Mr. Chhotaray relies upon the following judgments and decisions in support of his arguments:-

(i) Union of India vs. Dharmendra Textiles Processors and Ors., (2008) 306 ITR 277;

(ii) Commissioner of Income Tax vs. Zoom Communication P. Ltd., (2010) 327 ITR 510;

(iii) Mak Data P. Ltd. vs. Commissioner of Income Tax-II, Judgment in Civil Appeal No. 9772 of 2013, decided on 30th October, 2013 (Supreme Court).

13. For appreciating these contentions, one must peruse the order of the Assessing Officer. The Assessing Officer passed an order on 8th March, 1990. He held that though the assessee maintains that he has not concealed any particulars, but it is evident that there was increase in the income. The assessee pointed out that during the year, the income from one of the

distributors was treated as advance. In the revised return, in response to notice under section 148, the income was shown on minimum guarantee basis and the mistake in the earlier year occurred due to non-availability of agreement. The distributor had claimed the same as minimum guarantee while the asessee treated as an advance. The total receipts were accurately shown and there was in fact no concealment, but a technical error. It is in these circumstances it was urged that the assessee acted bonafide. However, the Assessing Officer found from the record that in the original assessment, which was completed on 14th March, 1980, the loss was determined at Rs.4,04,703/- as against returned loss of Rs.4,80,530/-. Subsequently, it came to light that the picture "Charas" was sold on minimum guarantee basis to M/s. Prakash Pictures for Rs.13,70,000/-. Out of this amount, the assessee disclosed only Rs.3,90,917.62. The particulars of this income were also not disclosed. Therefore, the re-opening of the assessment had to be done. In that, the assessee filed a return showing income of Rs.4,98,530/- and the assessment was subsequently completed on total income of Rs.86,280/- after setting off the brought forward loss amounting to Rs.6,93,200/-. The addition of amount of Rs.9,79,083/- on account of minimum guarantee realisation was upheld in appeal by order dated 13th November, 1981. This decision was accepted by the assessee.

14. That is how the Assessing Officer concluded that the assessee had knowingly filed inaccurate particulars of his total income, thereby attracting section 271(1)(c) of the Income Tax Act, 1961. This provision, at the relevant time as also now reads as under:-

At the relevant time:-

> "271. (1) If the Income-Tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person-
>
> (a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 or section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of section 139 or by such notice, as the case may be, or
>
> (b) has without reasonable cause failed to comply with a notice under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or
>
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income,
>
> he may direct that such person shall pay by way of penalty,-
>
> (i) in the cases referred to in clause (a);
>
> (a) in the case of a person referred to in sub-section (4A) of section 139, where the total income in respect of which he is assessable as a representative assessee does not exceed the maximum amount which is not chargeable to income-tax, a sum not exceeding one per cent of the total income computed under this act without giving effect to the provisions of sections 11

and 12, for each year or part thereof during which the default continued;

(b) in any other case, in addition to the amount of the tax, if any, payable by him, a sum equal to two percent of the assessed tax for every month during which the default continued.

*Explanation.* - In this clause, "assessed tax" means tax as reduced by the sum, if any, deducted at source under Chapter XVIIB or paid in advance under Chapter XVIIC;

(ii) in the cases referred to in clause (b), in addition to any tax payable by him, a sum which shall not be less than ten per cent but which would have been avoided if the income returned by such person had been accepted as the correct income;

(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 twice, 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:

Provided that if in a case falling under clause (c), the amount of income (as determined by the Income-tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished, exceeds a sum of twenty-five thousand rupees, the Income-tax Officer shall not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner.

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 Income-tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) to be false, or

(B) such person offers an explanation which he is not able to substantiate,

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.

Provided that nothing contained in this Explanation shall apply to a case referred to in clause (B) in respect of any amount added or disallowed as a result of the rejection of any explanation offered by such person, if such explanation is bona fide and all the facts relating to the same and material to the computation of his total income have been disclosed by him.

Explanation 2 : Where the source of any receipt, deposit, outgoing or investment in any assessment year is claimed by any person to be an amount which had been added in computing the income or deducted in computing the loss in the assessment of such person for any earlier assessment year or years but in respect of which no penalty under clause (iii) of this sub-section had been levied, that part of the amount so added or deducted in such earlier assessment year immediately preceding the year in which the receipt, deposit, outgoing or investment appears (such earlier assessment year hereafter in this Explanation referred to as the first preceding year) which is sufficient to cover the amount represented by such receipt, deposit or outgoing or value of such investment (such amount or value hereafter in this Explanation referred to as the utilised amount) shall be treated as the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the first preceding year; and where the amount so added or deducted in the first preceding year is not sufficient to cover the utilised amount, that part of the amount so added or deducted in the year immediately preceding the first preceding year which is sufficient to cover such part of the utilised amount as is not so covered shall be treated to be the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the year immediately preceding the first preceding year and so on, until the entire utilised amount is covered by the amounts so added or deducted in such earlier assessment years.

Explanation 3 : Where any person who has not previously been assessed under the Indian Income-tax Act, 1922 (11 of 1922) or under this Act fails, without reasonable cause,

to furnish within the period specified in sub-clause (iii) of clause (a) of sub-section (1) of section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after the 1st day of April, 1974, and, until the expiry of the period aforesaid, no notice has been issued to him under sub-section (2) of section 139 or section 148 and the Income Tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148.

Explanation 4 : for the purpose of clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded", -

(a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished exceeds the total income assessed, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;

(b) in any case to which Explanation 3 applies, means the tax on the total income assessed;

(c) in any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished.

(1A) Where any penalty is imposable by virtue of Explanation 2 to sub-section (1), proceedings for the imposition of such penalty may be initiated notwithstanding that any proceedings under this Act in the course of which such penalty proceedings could have been initiated under sub-section (1) have been completed.

(2) When the person liable to penalty is a registered firm or an unregistered firm which has been assessed under

clause (b) of section 183, then notwithstanding anything contained in the other provisions of this Act, the penalty imposable under sub-section (1) shall be the same amount as would be imposable on that firm if that firm were an unregistered firm.

(3) Notwithstanding anything contained in this section, -

(a) no penalty for failure to furnish the return of his total income under sub-section (1) of section 139 shall be imposed under sub-section (1) on an assessee whose total income does not exceed the maximum amount not chargeable to tax in his case by one thousand five hundred rupees;

(b) where a person has failed to comply with a notice under sub-section (2) of section 139 or section 148 and proves that he has no income liable to tax, the penalty imposable under section (1) shall not exceed twenty-five rupees;

(c) no penalty shall be imposed under sub-section (1) upon any person assessable under clause (i) of sub-section (1) of section 160, read with section 161, as the agent of a non-resident for failure to furnish the return under sub-section (1) of section 139:

Provided that nothing contained in clause (a) or clause (b) shall apply to a case referred to in sub-clause (a) of clause (i) of sub-section (1).

(4) If the assessing Officer or the Appellate Assistant Commissioner, or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership on the basis of which the firm has been registered under this Act, and that any partner has thereby returned his income below its real amount, he may direct that such partner shall, in addition to the tax, if any, payable by him, pay by way of penalty a sum not exceeding one and a half times the amount of tax which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income; and no refund or other adjustment shall be claimable by any other partner by reason of such direction."

Now:-

"271. (1) If the Assessing officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person

(a) *****

(b) has failed to comply with a notice under sub-section (2) of section 115WD or under sub-section (2) of section 115WE or under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or

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

(d) has concealed the particulars of the fringe benefits or furnished inaccurate particulars of such fringe benefits,

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

(i) *****

(ii) in the cases referred to in clause (b) in addition to tax, if any, payable by him, a sum of ten thousand rupees for each such failure;

(iii) in the cases referred to in clause (c) or clause (d), in addition to tax, if any, 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 fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits.

*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) or the Principal Commissioner or 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.

*Explanation 2.* - Where the source of any receipt, deposit, outgoing or investment in any assessment year is claimed by any person to be an amount which had been added in computing the income or deducted in computing the loss in the assessment of such person for any earlier assessment year or years but in respect of which no penalty under clause (iii) of this sub-section had been levied, that part of the amount so added or deducted in such earlier assessment year immediately preceding the year in which the receipt, deposit, outgoing or investment appears (such earlier assessment year hereafter in this Explanation referred to as the first preceding year) which is sufficient to cover the amount represented by such receipt, deposit or outgoing or value of such investment (such amount or value hereafter in this Explanation referred to as the utilised amount) shall be treated as the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the first preceding year; and where the amount so added or deducted in the first preceding year is not sufficient to cover the utilised amount, that part of the amount so added or deducted in the year immediately preceding the first preceding year which is sufficient to cover such part of the utilised amount as is not so covered shall be treated to be the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the year immediately preceding the first preceding year and so on, until the entire utilised amount is covered by the amounts so added or deducted in such earlier assessment years.

*Explanation 3.* - Where any person fails, without reasonable cause, to furnish within the period specified in sub-section (1) of section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after the 1st day of

April, 1989, and until the expiry of the period aforesaid, no notice has been issued to him under clause (i) of sub-section (1) of section 142 or section 148 and the Assessing Officer or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148.

*Explanation 4.* - For the purposes of clause (iii) of this sub-section, -

(a) the amount of tax sought to be evaded shall be determined in accordance with the following formula-

(A-B) + (C-D)

where,

A = amount of tax on the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);

B = amount of tax that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished;

C = amount of tax on the total income assessed as per the provisions contained in section 115JB or section 115JC;

D = amount of tax that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished:

Provided that where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished on any issue is considered both under the provisions

contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D:

Provided further that in a case where the provisions contained in section 115JB or section 115JC are not applicable, the item (C-D) in the formula shall be ignored;

(b) where in any case the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, the amount of tax sought to be evaded shall be determined in accordance with the formula specified in clause (a) with the modification that the amount to be determined for item (A-B) in that formula shall be the amount of tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income.

(c) where in any case to which Explanation 3 applied, the amount of tax sought to be evaded shall be the tax on the total income assessed as reduced by the amount of advance tax, tax deducted at source, tax collected at source and self-assessment tax paid before the issue of notice under section 148.

*Explanation 5.* - Where in the course of a search initiated under section 132 before the 1st day of June, 2007, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income,-

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end on or after the date of the search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, unless, -

(1) such income is, or the transactions resulting in such income are recorded, -

(i) in a case falling under clause (a), before the date of the search; and

(ii) in a case falling under clause (b), on or before such date,

in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the said date; or

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.

*Explanation 5A.* - Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of -

(i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or

(ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year,

which has ended before the date of search and, -

(a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or

(b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

*Explanation 6.* - Where any adjustment is made in the income or loss declared in the return under the proviso to clause (d) of sub-section (1) of section 143 and additional tax charged under that section, the provisions of this sub-section shall not apply in relation to the adjustment so made.

*Explanation 7.* - Where in the case of an assessee who has entered into an international transaction or specified domestic transaction defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed 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 or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner that the price charged or paid in such transactions was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence.

(1A)Where any penalty is imposable by virtue of Explanation 2 to sub-section (1), proceedings for the

imposition of such penalty may be initiated notwithstanding that any proceedings under this Act in the course of which such penalty proceedings could have been initiated under sub-section (1) have been completed.

(1B) Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c).

(2) When the person liable to penalty is a registered firm or an unregistered firm which has been assessed under clause (b) of section 183, then notwithstanding anything contained in the other provision of this act, the penalty imposable under sub-section (1) shall be the same amount as would be imposable on that firm if that firm were an unregistered firm.

(3) *****

(4) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership on the basis of which the firm has been registered under this Act, and that any partner has thereby returned his income below its real amount, he may direct that such partner shall, in addition to the tax, if any, payable by him, pay by way of penalty a sum not exceeding one and a half times the amount of tax which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income; and no refund or other adjustment shall be claimable by any other partner by reason of such direction.

(4A) and (4B) *****

(5) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1989 shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other

> provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.
>
> (6) Any reference in this section to the income shall be construed as a reference to the income or fringe benefits, as the case may be, and the provisions of this section shall, as far as may be, apply in relation to any assessment in respect of fringe benefits also.
>
> (7) The provisions of this section shall not apply to and in relation to any assessment for the assessment year commencing on or after the 1st day of April, 2017."

15. To our mind, Mr. Chhotaray is right in his contentions for the simple reason that the assessee could not have got away by urging that the copy of the agreement with M/s. Prakash Pictures was not available. The assessee should have been candid and honest in disclosing that the agreement with M/s. Prakash Pictures resulted in the assessee obtaining the sum of Rs.13,70,000/-. The assessee would have received this sum in respect of the distribution right of the picture "Charas" in Bombay Territory. The assessee, in the original file, did not disclose fully and truly all the particulars of income for the relevant year. The assessee maintains that the amount was not to be realised fully, but it was inaccurate in the sense that the distributor M/s.Prakash Pictures was also assessed to tax. M/s. Prakash Pictures produced the record and which referred that the assessee before us was paid the same price of Rs.13,70,000/-. M/s. Prakash Pictures debited this amount as the cost of

acquisition of the picture. It is in these circumstances that we find that the assessee managed to thwart the tax liability as rightly held by the Tribunal. This finding of fact rendered by the Tribunal cannot be termed as perverse. The Commissioner of Income Tax (Appeals), namely, the first appellate authority was carried away by the fact that the sum of Rs.13,70,000 was split in two parts, namely, Rs. 3,90,917/- and Rs.9,79,083/- respectively shown as minimum guarantee receipt and as advance from the distributor. However, the explanation of the asessee was that there is no concealment and at the time the accounts were framed, the assessee did not have the agreement between the parties so that it was not clear as to what was the minimum guarantee commission and what was the advance. Thus, this was a technical error. This argument somehow found favour with the Commissioner as is apparent from his reasoning from para 1.2 at pages 14-15 of the order.

16. The Tribunal rightly came to the conclusion that it was immaterial as to whether the agreement was available or otherwise. However, it is not possible that the agreement in writing was not available. Even if formal written agreement was not available, it certainly would have been on the basis of some prior negotiations. The assessee and M/s. Prakash Pictures are

both in film making and distributing business. Hence, they ought to have known the nature of transaction despite non-availability of the agreement. Secondly, the assessee cannot depend on the other party to the transaction for making entries in his book. In other words, the assessee cannot say that he did not know how M/s. Prakash Pictures had treated the transaction. The Tribunal rightly held that such a lapse cannot be treated as technical error. The second argument that there was no tax effect and hence there was no *mens-rea* is equally baseless. If the assessee had included the entire receipts in the year under consideration, he would have ended up paying tax for the present year because even after setting off the brought forward losses, as mentioned earlier, the loss would have been converted into positive income with the inclusion of the balance receipt. Further, by virtue of losses of the assessment year 1977-78 and earlier years being wiped out, the assessee could not have availed of the benefit of further unabsorbed losses during the assessment year 1978-79. Thus, the Tribunal concluded that by not including the entire receipts in the assessment year 1977-78, the assessee was able to thwart his tax liability for two years, namely, assessment year 1977-78 and 1978-79. Thus, by deferring the declaration to the subsequent year, the assessee certainly furnished inaccurate particulars of income for the year under appeal and either

avoided or deferred his tax liability. The reasoning in that behalf in para 7 of the Tribunal's order is as under:-

> "7. By declaring part receipts in assessment year 1978-79, vis-a-vis the department one can broadly claim that there was no concealment. But by deferring the declaration to the subsequent year the assessee certainly furnished inaccurate particulars of income for the year under appeal and either avoided or deferred his tax liability. It has also to be appreciated that when the assessee takes up the assessment for agreement year 1977-78, the return for assessment year 1978-79 and the particulars thereof cannot be expected to be before him. Even if the agreement for assessment year 1977-78 is taken up after furnishing of the return for A. Y. 1978-79, it cannot be expected by the AO to ascertain said mote that part receipts are declared in the subsequent year. Firstly, it may not be out of place to mention that M/s. Prakash Pictures had claimed the entire amount as MG during the year under consideration. Thus we have no hesitation in restoring the penalty of Rs.6,46,588/- cancelled by the CIT(A)."

17. We are, therefore, of the opinion that none of the decisions relied upon by Ms. Sathe are of any assistance.

18. In the case of the *Commissioner of Income-Tax vs. Manilal Tarachand*[2], the Gujarat High Court was dealing with a case where the amount received by the assessee had been returned by the assessee in his return of income for the assessment year 1975-76. The Income Tax Officer initiated re-assessment proceedings based on this disclosure made by the assessee for assessment year 1975-76. The Commissioner of Income Tax initiated proceedings under section 263 of the Act stating that the

2 **(2002) 254 ITR 630**

assessment order framed on 8th March, 1985 under section 143(3) read with section 147 of the Income Tax Act, 1961 was erroneous insofar as it was prejudicial to the interest of the Revenue as the Income Tax Officer had failed to mention the point regarding initiation of penalty proceedings under section 271(1)(c) on account of concealment of income or furnishing inaccurate particulars of income. The assessee resisted the notice for revision on two fold count. Firstly, it was contended that the provisions of section 263 did not empower the Commissioner of Income Tax to assume jurisdiction on account of failure to initiate penalty proceedings at the time of assessment. Secondly, it was contended that in view of the facts and circumstances of the case, it could not be said that the assessee had concealed or furnished inaccurate particulars of income for which penalty proceedings could be initiated. The Commissioner of Income Tax did not accept the submissions resulting in the assessee going in appeal before the Tribunal. The Tribunal relied upon certain decisions and came to the conclusion that the Commissioner was not justified in interfering in his revisionary jurisdiction under section 263 of the Income Tax Act, 1961.

19. It is such an issue before the Gujarat High Court in which it came to the conclusion that this is not a case where penalty could

be imposed on the assessee on the charge of either concealment of income or furnishing inaccurate particulars of income. The dispute in the assessment between the Department and the assessee was to the effect that as to which year the compensation received by the assessee was taxable. The assessee was under the belief that he would be liable to capital gains tax only on receipt of the compensation and accordingly had shown the liability to capital gains tax in his return of income for the assessment year 1975-76. Though for the purposes of reassessment proceedings, the Income Tax Officer would be within his powers to initiate proceedings under section 147 for the assessment year 1973-74, it is not possible to hold that penalty under section 271(1)(c) could be levied for the said assessment year. Thus, these facts were peculiar and in that backdrop, the finding of fact was recorded. That was recorded for the simple reason that the assessee, an individual had been assessed to tax for assessment year 1973-74. However, in the re-assessment, the Assessing Officer brought to tax long term capital gains in relation to the compensation received in land acquisition proceedings, which, admittedly, the assessee had not disclosed in the income for the year under consideration. However, this amount received by the assessee in return of income for the assessment year was disclosed in the return of income for assessment year 1975-76.

While re-assessing the income, the Income Tax Officer did not impose any penalty. The issue was, this penalty should have been imposed and to that extent, the Commissioner came to the conclusion that section 263 of the Income Tax Act, 1961 confer in him enough powers to direct the initiation of penalty proceedings. It is that peculiar aspect of the matter which led to the High Court holding that there was on facts also no penalty leviable for this was not a case where the assessee concealed the income or furnished inaccurate particulars thereof. We do not think that this decision is of any assistance.

20. In the case of *Commissioner of Income Tax vs. Reliance Petroproducts Pvt. Ltd.*[3], the Hon'ble Supreme Court came to the conclusion that the assessee must have furnished inaccurate particulars of income. The word "particulars" used in section 271(1)(c) would embrace the details of the claim made. When no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. It is in that context that the Hon'ble Supreme Court came to the conclusion that there ought to be a finding that no details were supplied by the assessee in his returns. When there is no finding that any details supplied by the

3 **(2010) 322 ITR 158**

assessee in its returns are found to be inaccurate or erroneous or false, there is no question of inviting the penalty under section 271(1)(c). This was a case where a claim was made which was not sustainable in law. That by itself does not amount to furnishing inaccurate particulars regarding income of the assessee. We are, therefore, of the opinion that this decision also is of no assistance because in the facts and circumstances of the present case case, the assessee, as a matter of record, had only disclosed part of the income derived from the sale of the picture "Charas" to M/s. Prakash Pictures. That the later part was not admittedly declared, but came to be returned in the subsequent assessment years is admitted. Secondly, the argument that the nature of the transaction was not known has been rejected by two concurrent findings and which are not perverse. The Tribunal found that the entire receipts were not included in the order under consideration for that would have resulted in the assessee paying tax. The attempt was to avoid the liability.

21. Lastly, the decision in the case of *Price Waterhouse Coopers Pvt. Ltd. vs. Commissioner of Income-Tax and Anr.*[4] is also of no assistance because in that case the Hon'ble Supreme Court noted that the imposition of penalty was not justified because in the

4 **(2012) 348 ITR 306**

assessment year 2000-01, the assessee, which provides multidisciplinary management consultancy services, filed a return of income on 30th November, 2000 under section 139(6) read with section 139(6A) and what it did was it filed a statement. A form had to be filled in because the assessee was required to file its tax audit report. The statement contains particulars, but it indicated that the provision towards payment of gratuity was not allowable. The assessee claimed a deduction thereon in its return of income. On the basis of the return and the statement, an assessment order was passed under section 143(3) of the Act on 26th March, 2003. The assessee claimed that through inadvertence, this deduction was claimed and it also seems to have been overlooked by the Assessing Officer. Much later, the Assessing Officer issued a notice to re-open the assessment and he did not indicate any reason why it was issued except to state that income for the assessment year 2000-01 had escaped assessment. In response to the notice, the assessee filed its return under protest on 16th February, 2004 and also requested for the grounds for re-opening the assessment. Since after the reasons were communicated, the assessee realised that he has committed a mistake and addressed a letter to the Assessing Officer stating that there was no willful suppression of facts by the assessee but that a genuine mistake or omission had

been committed, which also appears to have been overlooked by the Assessing Officer before whom the tax audit report was placed. Accordingly, the assessee filed a revised return on the same day. The re-assessment was passed on the same day and the assessee then paid the tax due as well as the interest thereon. It is, therefore, the Hon'ble Supreme Court termed these as unfortunate circumstances in which the penalty proceedings under section 271(1)(c) of the Income Tax Act, 1961 were initiated against the assessee. The penalty was determined, against which an appeal was filed, which also has been rejected. The Tribunal also upheld the imposition of penalty. Significantly, the Tribunal mentioned that the assessee had made a mistake which could be described as a silly mistake, since the assessee is a high-caliber and competent organisation, it was not expected to make such a mistake. Accordingly, the Tribunal reduced the penalty to 100%. It is in these circumstances, the Hon'ble Supreme Court found that the Calcutta High Court erred in dismissing the appeal. All the observations made by the Hon'ble Supreme Court in this case so as to allow the appeal and set aside the orders imposing penalty ought to be viewed in the backdrop of these facts and circumstances. On facts, therefore, even this decision is distinguishable.

22. To our mind, the reliance placed by Mr. Chhotaray on section 271(1)(c) as also the judgment in the case of *Union of India and Ors. vs. Dharmendra Textiles Processors and Ors.*[5] is apposite. There is no question of mens-rea, as the Hon'ble Supreme Court concludes in this decision and also in para 27 holds that the *Explanation* appended to section 271(1)(c) entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the returns. The object behind the enactment of section 271(1)(c) read with the *Explanations* indicates 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 Income Tax Act, 1961.

23. Once we come to this conclusion that we need not refer to the other judgments cited by Mr. Chhotaray but his reliance on an unreported judgment of the Hon'ble Supreme Court, rendered in the case of *Mak Data P. Ltd. vs. Commissioner of Income Tax-II*[6] is equally accurate. This judgment essentially follows and applies the view in the case of *Dharmendra Textiles* (supra). Therefore, a

5 **(2008) 306 ITR 277**
6 **Civil Appeal No. 9772 of 2013**

voluntary disclosure in all cases cannot absolve the assessee from the liability to pay penalty.

24. For the aforesaid reasons, we find that the questions forwarded to this court for its opinion would have to be answered in favour of the Revenue and against the assessee. They are answered accordingly. The reference is disposed of.

(PRAKASH.D.NAIK, J.) (S.C.DHARMADHIKARI, J.)