IN THE HIGH COURTOF PUNJAB AND HARYANA, CHANDIGARH.

ITA No. 871 of 2008
Date of decision:1.7.2009

Commissioner of Income Tax, Panchkula.

....Appellant

vs.

Haryana Warehousing Corporation

...Respondent

CORAM: HON'BLE MR.JUSTICE J.S.KHEHAR.
HON'BLE MR.JUSTICE AJAY TEWARI.

Present: Mr. Sanjay Bansal, Senior Advocate, with
Mr.Prashat Bansal, Advocate, for the appellant.

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J.S.KHEHAR,J.

1. The respondent-assessee i.e. the Haryana Warehousing Corporation, is a State Government Undertaking created under the Warehousing Corporation Act, 1962. The creation of the respondent-assessee was with the aim of building warehouses all over the State of Haryana, for storage of food grains on behalf of the Food Corporation of India.

2. It would be pertinent to mention, that the respondent-assessee was assessed to income tax for the assessment year 1993-94 at Rs.1,04,61,330/- vide order dated 21.4.2006, as against a nil income tax return, submitted by the respondent-assessee on 31.12.1993. The Assessing Officer, accordingly arrived at the conclusion, that by filing a nil income tax return for the assessment year 1993-94, the respondent-assessee had sought to evade income tax to the tune of Rs.1,04,61,330/-. The minimum penalty

imposable for the same being the quantum of tax evaded, the Assessing Officer imposed the penalty of Rs.1,04,61,330/-. The aforesaid determination at the hands of the Assessing Officer was affirmed by the Commissioner of Income Tax (Appeals) vide his order dated 2.9.2006.

3. The instant appeal has been preferred against the order passed by the Income Tax Appellate Tribunal dated 4.10.2007 by which the orders passed by the Assessing Officer, and the Commissioner of Income Tax (Appeals) dated 30.3.2006 and 2.9.2006 respectively, imposing a penalty on the respondent-assessee under section 271(1)(c) of the Act, has been set aside.

4. Before proceeding to determine the merits of the claim raised by the revenue in the instant appeal, it would be essential to narrate the background on the basis of which proceedings under section 271(1)((c) of the Act, were initiated against the respondent-assessee. In this behalf, it would be pertinent to mention, that the respondent-assessee had been claiming exemption of its entire income under section 10(29) of the Act. Section 10(29) of the Act, is being extracted hereunder:-

> "**10. Incomes not included in total income-** In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-
>
> (1) to (28) xx xx
>
> (29) in the case of an authority constituted under any law for the time being in force for the marketing of commodities, any income derived from the letting out of godown or warehouses for storage, processing or facilitating the marketing of commodities".

It is not a matter of dispute that upto the assessment year 1991-92 the

respondent-assessee i.e., the Haryana Warehousing Corporation claimed the benefit of tax exemption under section 10(29) of the Act, in respect of its entire income. This claim made by the respondent-assessee was accepted by the revenue. Accordingly, it would not be incorrect to record, that the respondent-assessee was allowed the benefit of deduction under section 10 (29) of the Act uninterruptedly till the assessment year 1991-92.

5. It would also be pertinent to notice that the claim of the respondent-assessee was based on a decision rendered by a Division Bench of Allahabd High Court in CIT v. U.P. State Warehousing Corporation, (1992) 195 ITR 273, which had held that the entire income of warehousing including the income derived from procurement of wheat, as an agent of the government, was exempt from the liability of tax. The High Court had upheld the determination rendered by the Income Tax Appellate Tribunal that income received by the Warehousing Corporation, though described as miscellaneous receipts, was in-truth income derived from letting warehouses for storage, processing and fecilitating the marketing of commodities. And as such, the decision rendered by the Income Tax Appellate Tribunal that the warehousing Corporation receipts and commission was entitled to exemption under section 10(29) of the Act, was also upheld by the High Court. The revenue had preferred an appeal against the aforesaid decision of the Allahabad High Court before the Apex Court. The Supreme Court while disposing of Civil Appeal Nos.1240 and 1241 of 1979 (filed against the aforesaid order passed by the Allahabad High Court) passed the following order on 9.4.1996:-

> "In view of the decision of this Court, in the case of the Union of India & Another, U.P.State Warehousing Corporation, 187

> ITR 54 which affirms the view taken in the impugned judgment. These appeals are dismissed. No costs".

It is,therefore, apparent that the Supreme Court did not find any justification to interfere with the order passed by the Allahabd High Court in the judgment referred to hereinabove.

6. It would also be pertinent to mention that on the same issue, the opinion expressed by a Division Bench of the Madhya Pradesh High Court in M.P.Warehousing Corporation v. (1982) CIT, 133 ITR 158, was at variance with the one rendered by the Allahabad High Court. In the aforecited judgment, the Madhya Pradesh High Court had concluded, that only such income, as was earned by the Warehousing Corporation by letting out godowns and warehouses for storage, processing or fecilitating marketing of commodities was exempt from income tax. Income derived by the Warehousing Corporation by letting of godowns or warehouses for any other purpose, was not emanable to such exemption. In the instant judgment, the Madhya Pradesh High Court expressly arrived at the conclusion, that income derived from commission earned from handling agricultural commodities, as well as, income derived on account of interest earned on fixed deposits with banks, were not exempt from income tax under section 10(29) of the Act.

7. Likewise a Division Bench of Karnataka High Court in Karnataka State Warehousing Corporation v. CIT (1990) 185 ITR 25 arrived at the conclusion, that income earned out of fumigation charges, as well as, income derived from laboratory installation fee were not exempt from income tax under section 10(29) of the Act. The High Court in clear and categoric terms concluded that income received by the Warehousing

Corporation for services rendered in respect of goods not stored in the assessee's godowns was not exempt under section 10(29) of the Act.

8. Even the Rajasthan High Court in the case of CIT v. Rajasthan State Warehousing Corporation,(1994) 210 ITR 906, held that only rental income earned by the Warehousing Corporation qualifies for exemption under section 10(29) of the Act. The High Court expressly held the income derived from procurement of grains, from administrative overheads, interest received from banks, and the like, were not relatable to letting of godowns and warehouses for fecilitating marketing of commodities and as such were not exempt under section 10(29) of the Act. The High Court, however held, that fumigation charges were in respect of service charges collected during the course of storage of goods in godowns, and as such, were exempt from the liability of tax. The Rajasthan Warehousing Corporation preferred an appeal against the judgment rendered by the Division Bench of the Rajasthan High Court in the case cited hereinabove, before the Apex Court. The aforesaid appeal was however, dismissed by the Supreme Court on 1.4.1999.

9. In view of the conflicting legal position rendered by the Allahabad High Court (paragraph 5 above) on the one hand, and by the High Courts of Madhya Pradesh (paragraph 6 above), Karnataka (paragraph 7 above) and Rajasthan (paragraph 8 above), it is apparent that the matter needed to be settled by the Apex Court. The Supreme Court referred the issue,namely, whether the entire income of a Warehousing Corporation, was exempt under section 10(29) of the Act, or whether rental income charged for storage, processing or fecilitating the marketing of commodities in godowns and warehouses alone, was exempt from the

liability of tax, to a larger Bench in CIT v. Gujarat State Warehousing Corporation (2000) 245 ITR 1.

10. In so far as the present appeal is concerned, as already noticed hereinabove, the entire income of the respondent-assessee, was accepted by the revenue as exempt from the liability of tax, upto the assessment year 1991-92. However, based on the judgments rendered by different High Courts (other than Allahabad High Court), referred to in the foregoing paragraphs, the revenue concluded, that income drawn by the respondent-assessee from all heads other than rental income earned by it from letting out godowns and warehouses, was taxable. The aforesaid determination by the revenue against the respondent-assessee, was assailed by the respondent-assessee in respect of the assessment years 1992-93 and 1993-94 before the Supreme Court, wherein, the Apex Court admitted the petitions for Special Leave to Appeal, preferred by the respondent-assessee i.e., the Haryana Warehousing Corporation.

11. In view of the above, the respondent-assessee i.e., the Haryana Warehousing Corporation filed a nil income tax return for the assessment 1993-94 on 31.12.1993 claiming that its entire income was exempt from the liability of tax under section 10(29) of the Act. Along with the aforesaid return, a computation chart depicting the total income of the respondent-assessee was also filed. The respondent-assessee also attached with its return the audit report of its Chartered Accountant. A notice under section 143(2) of the Act, was issued to the respondent-assessee for initiation of proceedings under section 143(3) of the Act, i.e., for framing regular assessment. The aforesaid notice was issued on 10.1.2005. In reply to the aforesaid notice, the respondent-assessee submitted a revised computation

of its income wherein it incorporated the following note:-

> "Note
>
> 1.Entire income of the warehousing is claimed exempt including from procurement of wheat as an agement of the Govt. reliance for this is placed on the judgment of Hon'ble Allahabd High Court reported in 195 ITR 273 in the case of CIT Vs. U.P. Warehousing Corporation. The High Court while delivering the judgment relied upon the Supreme Court judgment 187 ITR 54.
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> 2. Rebate on C.M. Relief Fund of Rs.5 lacs, be allowed under section 80-G.
>
> 3. In case any income is held to be taxable then indivisible expenses be apportioned between taxable and non-taxable income."

12. After taking into consideration the revised computation submitted by the respondent-assessee the Assessing Officer passed an assessment order on 2.2.1996 under section 143(3) of the Act. By the aforesaid order, the respondent-assessee was denied exemption under section 10(29) of the Act, on income earned by it from all other sources except income derived by it on account of letting out godowns and warehouses for storage, processing or fecilitating the marketing of commodities. A perusal of the aforesaid assessment order reveals, that the Assessing Officer was of the view, that the respondent-assessee had earned income from fumigation charges (Rs.12,85,543/-), as well as, from way-bridge charges (Rs.1,23,731/-). Although, it was submitted on behalf of the respondent-assessee, that it had incurred losses under both the aforesaid heads, yet the income of the respondent-assessee under the aforesaid heads,

was assessed as Rs.1,10,000/-. The Assessing Officer also arrived at the conclusion, that the respondent-assessee had earned income of Rs.17,27,481/- by way of interest on loans advanced to the Haryana State Federation of Cooperative Sugar Mills (Sugar Federation). It was also held, that the Haryana Warehousing Corporation had earned income of Rs.2,24,34,767/- by way of trading in wheat. Additionally, the respondent-assessee was found to have earned income of Rs.80,831/- on account of forfeiture of earnest money from contractors who had been given contracts for constructing godowns. The Haryana Warehousing Corporation was additionally found to have earned incomes of Rs.14,510/- (for receipt of tender fee) Rs.10,652/- (on account of stitching charges), Rs.7,29,360/- (by way of sale of covers), and lastly, a sum of Rs.12,22,035/- (described as supervision charges, which were earned by way of handling charges, from persons who had availed of storage facilities). Eventually, the total income of the respondent-assessee after allowing permissible deductions was assessed at Rs.2,99,14,358/-.

13. The respondent-assessee preferred an appeal against the aforesaid assessment order. The assessee's appeal insofar as, the relief claimed by it under section 10(29) of the Act, was dismissed by the Income Tax Appellate Tribunal vide an order dated 18.5.2004. However, certain claims raised by the respondent-assessee before the Income Tax Appellate Tribunal were accepted, as a consequence whereof, the matter was remanded to the Assessing Officer. Thereupon, the Assessing Officer, worked out the taxable income of the respondent-assessee at Rs.1,81,93,618/-. And on the basis thereof, the respondent-assessee was assessed to income tax of Rs.1,04,61,330/- for the assessment year 1993-94.

14. After passing of the aforesaid assessment order, a notice under section 271(1)(c) of the Act was issued to the respondent-assessee on 20.12.2005. The Haryana Warehousing Corporation responded to the aforesaid notice vide its letter dated 27.3.2006. The Assessing Officer while considering the reply furnished by the respondent-assessee held, that the Haryana Warehousing Corporation, by filing a nil income tax return for the assessment year 1993-94, had concealed its taxable income of Rs.1,81,93,618/-(which was finally assessed to tax at Rs.1,04,61,330/-after re-assessment was computed under section 254 of the Act). On account of the fact that the liability of income tax of the respondent-assessee was Rs.1,04,61,330/-, and the Assessing Officer could have imposed the maximum penalty of Rs.3,13,83,990/-, the Assistant Commissioner of Income Tax ,Panchkula, vide his order dated 30.3.2006,however, imposed the minimum permissible penalty of Rs.1,04,61,330/-.

15. The Haryana Warehousing Corporation preferred an appeal against the order dated 30.3.2006 before the Commissioner of Income Tax (Appeals) Panchkula. While disposing of the aforesaid appeal, the Appellate Authority, inter alia, noticed as under:-

> "...Firstly, the assessee wrongly and deliberately claimed the entire income as exempt u/s 10(29). the assessee was fully aware of the fact that this was not the deduction eligible to it. In addition, the assessee was aware that the eligible deduction was actually less than what was claimed. Once the assessee had claimed a deduction, that particular part of income was exempt, the assessee was under a legal obligation to realize that the expenses related to this income were not to be set off against the taxable income".

Based on the aforesaid determination, the Appellate Authority upheld the

imposition of the minimum penalty of Rs.1,04,61,330/- for concealment of income under section 271(1)(c) of the Act, vide its order dated 2.9.2006.

16. Dissatisfied with the orders passed by the Assessing Officer dated 30.3.2006, as also by the Appellate Authority dated 2.9.2006, the respondent-assessee preferred an appeal before the Income Tax Appellate Tribunal.

17. The Income Tax Apepllate Tribunal, inter alia, took into consideration the following issues canvassed on behalf of the respondent-assessee:-

Firstly, that the respondent-assessee had relied on the judgment rendered by the Allahabad High Court in CIT v. U.P. Warehousing Corporation 195 ITR 273, as against which a petition for Special Leave to Appeal preferred by the revenue has been dismissed by the Supreme Court. Relying on the aforesaid judgment the respondent-assessee had also incorporated a note in its reply to the notice under section 148 of the Act, issued to the respondent-assessee.

Secondly, at the time of filing of the return by the respondent-assessee a petition for Special Leave to Appeal was pending before the Supreme Court against the order passed by the Rajasthan High Court in CIT v. Rajasthan Warehousing Corporation 210 ITR 906, wherein, the Rajasthan Warehousing Corporation had raised the same claims under section 10(29) of the Act, as was being canvassed by the respondent-assessee.

Thirdly, petitions for Special Leave to Appeal, filed by the respondent-assessee i.e., the Haryana Warehousing Corporation, before the Supreme Court, where the respondent-assessee had raised

the same plea as it had raised in the return under reference seeking exemption of its entire income from tax liability under setion 10(29) of the Act for the assessment years 1992-93(had been granted) and 1993-94 (was pending) were still under consideration.

Fourthly, the Assessing Officer had passed an order under section 143(3) of the Act, in respect of the assessment year 1991-92 just before the return under reference had been filed, wherein the Assessing Officer had allowed the exemption sought by the respondent-assessee under section 10(29) of the Act in respect of its entire income, by an order dated 15.12.1993. The Assessing Officer had merely 15 days before the return for the assessment year (1993-94) was filed by the respondent- assessee on 31.12.1993 allowed the exemption claimed by the assessee to it.

Fifthly, despite the fact that the respondent-assessee had filed a nil income tax return for the assessment year 1993-94, claiming exemption under section 10(29) of the Act, yet it had disclosed its entire income by, depicting clearly the various heads under which the said income had been earned. And as such, it was not as if the respondent assessee had "concealed the particulars of his income" or "furnished inaccurate particulars of his income".

Based on the aforesaid considerations, the Income Tax Appellate Tribunal arrived at the conclusion that the respondent-assessee could not have been penalised for filing a false or inaccurate return, so as to impose upon it any penalty under section 271(1)(c) of the Act.

18. The aforesaid findings recorded by the Income Tax Appellate Tribunal are subject matter of challenge at the hands of the revenue through

the instant appeal. When the instant appeal came up for hearing for the first time on 11.2.2009, keeping in mind the fact that the Income Tax Appellate Tribunal had clearly and unambiguously recorded that the respondent-assessee i.e., the Haryana Warehousing Corporation had not furnished any inaccurate particulars, nor concealed its income. And also because the appellant revenue had not controverted the aforesaid factual position in the grounds of appeal raised by it. Learned counsel for the appellant-revenue was confronted with the aforesaid factual position. Learned counsel sought, and was afforded an an adjournment, to obtain instructions on the matter. While allowing the aforesaid adjournment, this Court passed the following order on 11.2.2009:-

> " The issue under consideration in the present appeal is, whether the respondent-assessee is guilty of having furnished inaccurate particulars. In this behalf, it would be pertinent to mention, that the respondent-assessee in its return claimed exemption under section 10(29) of the Income Tax Act, 1961. It is the vehement contention of the learned counsel for the appellant, that the respondent-assessee was not entitled to exemption under section 10(29) of the Income Tax Act, 1961, as the activity in question in furtherance whereof, the respondent-assessee was deriving income, was not in respect of letting out godown but on account of trading activity.
>
> Learned counsel for the appellant seeks an adjournment, so as to enable him to obtain instructions whether or not the respondent- assessee had disclosed the income earned by it in respect whereof, penalty proceedings under section 271(c) of the Income Tax Act, 1961 were initiated against him.
>
> Adjourned to 25.2.2009."

Despite various adjournments the appellant-revenue could not controvert the factual position depicted in the impugned order passed by the Income

Tax Appellate Tribunal. It shall, therefore, be taken that the factual position depicted in the order of the Income Tax Appellate Tribunal dated 4.10.2007, that the respondent-assessee had not furnished any inaccurate particulars nor had concealed any particulars of its income, must be deemed to be uncontroverted.

19. Despite the aforesaid factual position, learned counsel for the appellant-revenue on two occasions advanced submissions on merits. On both occasions, we were of the view that the instant appeal had been filed without application of mind, and as such, was liable to be dismissed with costs. On both occasions when our impressions were conveyed to the learned counsel for the appellant-revenue, he sought time to obtain further instructions. We were informed by him, that he had addressed communications to the concerned authorities informing them the intention of this Court to impose costs, in case the revenue pressed the present appeal. In the background of our view, that there was nothing for the revenue to canvass, so as to controvert the conclusions drawn by the Income Tax Appellate Tribunal, based on five submissions advanced on behalf of the respondent-assessee (reproduced in paragraph 17 hereinabove) which prima facie individually (and certainly collectively), were sufficient for upholding the impugned order passed by the Income Tax Appellate Tribunal.

20. It seems to us that the revenue functions in the same manner as other departments of administration, wherein the accepted norm is, to shift the responsibility of decision making to the judiciary. In sum and substance, the judiciary not only adjudicates upon legitimate controversies between quarreling parties, but also discharges the executive function of decision making. In furtherance of the intention expressed by this Court the revenue

took two steps. Firstly, it moved civil miscellaneou application No.12383-CII-of 2009, so as to place on the record of this case an affidavit of the Commissioner of Income,Panchkula, dated 19.5.2009. And secondly, it engaged services of a senior counsel to represent the revenue in the instant appeal before this Court, so as to require this Court to discharge its executive function of decision making.

21. Before learned senior counsel commenced to address arguments, we invited his attention to the factual position noticed in the preceding paragraph. Learned senior counsel expressed his helplessness, he was professionally duty bound to canvass the appeal on behalf of the revenue. We granted him the liberty to raise submissions without any interference during the course of hearing, so as to enable him to discharge his professional responsibility. The few submissions raised by him have individually been dealt with in the succeeding paragraphs.

22. The first submission advanced by the learned counsel for the appellant-revenue was, that when the respondent-assessee i.e., the Haryana Warehousing Corporation filed its return of income , it was clear to it that it was not entitled to exemption of its entire income. It was submitted, that the respondent-assessee was aware that income earned under heads other than rental income earned by it by letting godowns and warehouses for storage,processing or fecilitating the marketing of commodities, was taxable. It was pointed out to us, that exemption under section 10(29) of the Act could be availed of only for purposes of income relating to its warehousing activity, and for no other income. It was therefore submitted, that the claim made by the respondent-assessee, even as per its note (extracted in paragraph 11 hereinabove) was not bona fide, and therefore,

the initiation as well as imposition of penalty upon the respondent-assessee, under section 271(1)(c) of the Act, was not only valid but was also legitimate.

23. It is not possible for us to accept the first contention advanced by the learned counsel for the appellant-revenue. Undisputedly,in the judgment rendered by the Allahabad High Court in CIT v. U.P. State Warehousing Corporation, 195 ITR 273, it had been held that income besides rental from warehousing activity was also exempt from income tax under section 10(29) of the Act. A petition for Special Leave to Appeal preferred by the revenue against the aforesaid judgment had been dismissed by the Supreme Court on 9.4.1996 (for details refer to paragraph 5 above), whereas, the nil return under reference was filed on 31.12.1993. Although, the opinion expressed by the High Courts of Madhya Pradesh, Karnataka, and Rajasthan were to the contrary, yet at the time of filing of the return under reference, a petition for Special Leave to Appeal preferred by the Rajasthan Warehousing Corporation was pending consideration before the Supreme Court. On the same proposition of law the respondent-assessee had itself assailed the action of the respondent in respect of assessment years 1992-93 and 1993-1994 before the Supreme Court, and petition for Special Leave to Appeal preferred by the respondent-assessee for the assessment year 1992-93 had been granted, thereby, allowing the respondent-assessee leave to appeal, and for the assessment year 1993-94 was pending. Later on, the issue under reference arising out of the judgment rendered by the Gujarat High Court came to be referred to a larger Bench by the Supreme Court itself in CIT v. Gujarat Warehousing Corporation, (2000)245 ITR 1. It is, therefore, apparent that the legal position, which was

subject matter of consideration was still in flux and had not attained finality. It would not therefore be correct to state that the filing of the return by the respondent-assessee in any way lacked bona fide. In view of the above, in our view, the first contention advanced on behalf of the appellant-revenue is wholly misconceived. We may also add herein, that the acceptance of the instant plea would lead to the inference, that an assessee who canvasses a claim on the basis of its (assessee's) interpretation of the law, would be liable to penal action in case the revenue finds that the claim raised by the assessee is not acceptable. Such a determination would place curbs on the rights of an assessee, to raise claims it believes to be genuine, under the law. We are satisfied, that no such fetters can be placed on the rights of the assessee to raise genuine claims in its return. In the facts and circumstances disclosed hereinabove, we are satisfied, that the deduction claimed by the respondent-assessee was legitimate and bona fide, in terms of the conflicting determination of law on the proposition in question at the said juncture. We, therefore, find no merit in the first submission advanced by the learned counsel for the appellant-revenue.

24. The second contention advanced by the learned counsel for the appellant-revenue was, that the impugned order passed by the Income Tax Appellate Tribunal deleting the penalty imposed on the respondent-assessee under section 271(1)(c) of the Act, was not sustainable in law because of the clear judgment rendered by the Supreme Court in Union of India v. Dharamendra Textile Processors and others, 306 ITR 277. According to the learned counsel for the appellant-revenue the entire income which remained undisclosed, “with or without” any conscious act of the assessee, was liable to penal action. It is submitted by the learned counsel for the appellant-

revenue, that the concept of law, with regard to levy of penalty has drastically changed in view of the said judgment, inasmuch as, now penalty can be levied even when an assessee claims deduction or exemption by disclosing the correct particulars of its income. According to the learned counsel, if an addition is made in quantum proceedings by the revenue-authorities, which addition attains finality, an assessee per se becomes liable for penal action under section 271(1)(c) of the Act. It is the vehement contention of the learned counsel for the appellant-revenue, that a penalty automatically became leviable against the respondent-assessee under section 271(1)(c) of the Act, after the finalisation of quantum proceedings. In this behalf, it is also pointed out, that in view of the judgment of the Supreme Court referred to above, the dichotomy between penalty proceedings and assessment proceedings stands completely obliterated.

25. We have considered the second contention advanced by the learned counsel for the appellant revenue. To state the least, the instant submission is absolutely absurd. The parameters of imposition of penalty under section 271(1)(c) of the Act, have been incorporated in the provision itself. Section 271(1)(c) of the Act ,is being extracted hereunder:-

> "**Failure to furnish returns, comply with notices, concealment of income, etc.**
> **271.** (1) If the Assessing Officer or the Commissioner (Appeals) orthe Commissioner in the course of any proceedings under this Act, is satisfied that any person-
> (a) to (b) xx xx
> (c) has concealed the particulars of his house or furnished inaccurate particulars of such income, or
> (d) xx xx
> he may direct that such person shall pay by way of penalty-

(i) to (iii) xx xx

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 Commissioner to be false, or

(B) such peron 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 amout added ordisallowed 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 to 5-A xx xx".

The essential pre-requisites section 271(1)(c) of the Act before a penalty can be imposed are; the assessee should have either "concealed the particulars of his income", or alternatively the assessee should have "furnished inaccurate particulars" of his income. Therefore, before determining the liability of the respondent-assessee in the present case, it would first have to be ascertained, whether or not, the respondent-assessee had "concealed the particulars of his income", or had furnished "inaccurate particulars of his income". The clear and categoric finding at the hands of the Income Tax Appellate Tribunal in the impugned order dated 4.10.2007,was that the respondent-assessee had disclosed the entire facts without having concealed any income. There is no allegation against the respondent-assessee that it had furnished inaccurate particulars of its income. The aforesaid determination at the hands of the Income Tax

Appellate Tribunal have not been controverted even in the grounds raised in the instant appeal. Additionally, in spite of our order dated 11.2.2009 (extracted in paragraph 18 above) the appellant revenue has not been able to controvert the aforesaid finding of fact. Concealment of particulars of income, or furnishing incorrect particulars of income, have in our view, been confused by the appellant-revenue, with, an unacceptable plea for exemption of tax-liability. Section 271(1)(c) of the Act can be invoked for imposing a penalty on an assessee, only if there is a "concealment of particulars of income" or alternatively if an assessee furnishes "incorrect particulars of income". The respondent-assessee in the present controversy is guilty of neither of the above. Accordingly, we are satisfied that in the absence of the two pre-requisites postulated under section 271(1)(c) of the Act, it was not open to the appellant-revenue to inflict any penalty on the respondent-assessee.

26. It is also essential for us to notice, while dealing with the second submission advanced by the learned counsel for the appellant-revenue, that the issue which arose for determination before the Supreme Court in Union of India v. Dharamendra Textiles Processors and others, 306 ITR 277 was, whether under section 11AC inserted in the Central Excise Act, 1944, by the Finance Act 1996, penalty for evasion of payment of tax had to be mandatorily levied, in case of short of levy or non-levy of duty under the Central Excise Act, 1944, irrespective of the fact whether it was an intentional or innocent ommission. In other words, the Apex Court was examining a proposition, whether *mens-rea* was an essential ingredient before penalty under section 11AC of the Central Excise Act, 1944 could be levied. In view of the factual position noticed hereiinabove, the issue of

mens-rea does not arise in the present controversy because the ingredients before any penalty can be imposed on an assessee under section 271 (1)(c) of the Act, were not made out in the instant case, as has been concluded in the foregoing paragraph. Thus viewed, the judgment relied upon by the learned counsel for the appellant-revenue is, besides being a judgment under a different legislative enactment, is totally inapplicable to the facts and circumstances of this case. Accordingly, we find no merit even in the second contention advanced by the learned counsel for the appellant-revenue.

27. The third contention advanced on behalf of the appellant-revenue was, that the finding recorded by the Income Tax Appellate Tribunal, that since the Assessing Officer vide his assessment order dated 15.12.1993 had accepted the claim of the respondent-assessee under section 10(29) of the Act, whereby, the revenue accepted the claim of the respondent-assessee that its entire income (including income from heads other than rental income from its warehousing activity) was exempt from tax, was not sustainable in law for two reasons. Firstly, because the order dated 15.12.1993 was revised by the Commissioner of Income Tax, Rohtak, under section 263 of the Act (vide order dated 7.2.1996), and specially because, the respondent-assessee did not assail the same in appeal. According to the learned counsel for the respondent-assessee, the decision at the hands of the assessee to accept the said assessment order, also demonstrates, that the respondent-assessee intentionally made a false claim. Secondly, it is submitted, that the mere fact that the assessment order dated 15.12.1993 which had absolved the respondent-assessee from the liability of tax, for an earlier assessment year, could not be taken into consideration to

absolve it from penal consequences, in view of the decision rendered by the Supreme Court in Phool Chand Bajrang Lal v. ITO, 203 ITR 456, wherein the Apex Court held as under:-

> "We have to look to the purpose and intent of the provisions. One of the purposes of Section 147 appears to us to be to ensure that a party cannot get away willfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn and around and say "you accepted my lie, and now your hands are tied and you can do nothing". It would be a travesty of justice to allow the assessee that latitude." (at page 478).
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> The aforesaid observations aptly apply in the instant case in as much as the object behind the enactment of section 271(1)(c) and 147/148 of the Act is to provide for a remedy for loss of revenue".

To our mind, the third contention advanced by the learned counsel for the appellant-revenue is wholly misconceived. What has to be taken into consideration is the factual position, as it prevailed on 31.12.1993, when the respondent-assessee filed a nil income tax return. At that juncture, the order passed by the Commissioner of Income Tax, Rohtak, under section 263 of the Act dated 7.2.1996, was not available to it. The prevailing factual/legal position at the time offiling of the return dated 31.12.1993, was as has been summarised in paragraph 17 hereinabove (in terms of the decision rendered by the Income Tax Appellate Tribunal). The aforesaid factual/legal position has neither been controverted in the grounds of appeal, nor in the affidavit filed by the Commissioner of Income Tax, Panchkula, dated 19.5.2009. As such, we find no merit in the first plea. The second plea, noticed above, is in fact ridiculous, on account of the fact that the claim of the respondent-

assessee for exemption under section 10(29) of the Act was acceded to during the course of assessment for the year 1991-92 (vide order dated 15.12.1993). It was in fact, to our mind,wholly justified for the respondent-assessee to seek the same exemption when it filed return for the assessment year 1993-94 on 31.12.1993 i.e., a mere 15 days after the same plea raised by the respondent-assessee had been acceded to. For the aforesaid reason, we find no merit even second plea advanced by the learned counsel for the appellant-revenue.

28. No other submission, besides those noticed above, was raised on behalf of the respondent-assessee, during the course of hearing of the instant appeal.

29. In fact, to our mind all the five issues taken into consideration by the Income Tax Appellate Tribunal, while passing the impugned order dated 4.10.2007, were individually sufficient to accept the claim of the respondent-assessee. We are satisfied, that the instant appeal was not filed after due application of mind. Even after the passing of the order dated 11.2.2009 (extracted in paragraph 18 above), the appellant failed to examine the controversy in its correct perspective. Without any justification whatsoever, the appellant has pressed the instant appeal. As noticed hereinabove, we were convinced that the instant appeal was frivolous and ought not to have been filed. We had also made our intention clear that we would impose costs on the appellant if a reasonable cause was not shown. Pressing the instant appeal despite the expression of our verbal opinion also shows that the revenue shirked its responsibility of genuine decision making. We, for the present, refrain ourselves from imposing any costs on the appellant. This restraint is, because of our desire to awaken the revenue

to its responsibility. Costs are generally imposed by Courts, not as a measure of punishment, but as a matter of misuse of jurisdiction. A similar situation in the future may prompt us to take the next undesired step of imposing costs. We entertain the hope that in the future, the responsibility of genuine decision making, will be taken seriously; not only for the purpose of avoiding frivolous litigation and/or wasting Court time, but also for, avoiding unnecessary expense and harassment to an innocent litigant. Had we issued notice in the instant appeal and thereby summoned the respondent, we would have had no re-course, but to compensate the respondent by awarding appropriate costs. Since however, notice had not been issued to the respondent-assessee in the instant appeal, we feel that our note of caution and vigil, at the time of filing appeals, will suffice for the present.

30. For the reasons recorded hereinabove, the instant appeal is dismissed, without imposing any costs on the appellant-revenue.

(J.S.Khehar)
Judge

(Ajay Tewari)
Judge

1.7.2009
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