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

INCOME TAX APPEAL NO. 1396 OF 2013.

The Commissioner of Income Tax-2, Mumbai
Vs.

M/s Dalmia Dychem Industries, Ltd. Mumbai.

.. Appellant

.. Respondent

Mr.P.C.Chhotaray, for the Appellant.
Mr.Atul Jasani, for Respondent.

***CORAM: M.S.Sanklecha
& N.M.Jamdar, JJ.
Monday 6 July, 2015***

PC. :

By this appeal under Section 260A of the Income Tax Act, 1961, the Revenue seeks to challenge the order passed by the Income Tax Appellate Tribunal, Mumbai dated 21 November 2012. By the impugned order, the appeal filed by the Revenue before the Tribunal for the Assessment Year 2003-2004 was dismissed. The present Appeal relates to Assessment Year 2003-2004.

2 The Respondent-Assessee, in its accounts, had shown borrowed funds and interest free advances to its sister concerns. The Assessing Officer disallowed the proportionate interest out of the interest paid for the interest free advances given to the sister concern. The Assessee challenged this order before of Income Tax (Appeals)(Commissioner), who upheld the same. Thereafter the Assessee filed an appeal before the Income Tax Appellate Tribunal.

The Tribunal set aside the orders and restored the matter to the file on Assessing Officer for re-examination of the deductibility. The Tribunal relied on the decision of the Apex Court in **S.A.Builders Ltd. v. Commissioner of Income Tax (Appeals) and another** reported in [2007] 288 ITR 1(SC).

3 Upon remand, the Assessing Officer again disallowed the proportionate interest holding that the Assessee had borrowed funds of which interest liability had been incurred. The Assessing Officer also levied penalty holding that the Assessee concealed its income by furnishing inaccurate particulars. The Assessee thereafter filed an appeal before the Commissioner. The levy of penalty was challenged on the ground that Assessee had no malafide intention to evade any tax and all the facts and details were placed on record. The Commissioner by the order dated 10 June 2011 allowed the appeal. The Commissioner came to the conclusion that merely because the claim made by an Assessee was disallowed, penalty cannot be levied, unless it is demonstrated that the Assessee had any malafide intention.

4 The Revenue thereafter filed an appeal to the Income Tax Appellate Tribunal. The Tribunal accepted the reasoning of the Commissioner that the penalty cannot be levied merely because the claim of the Assessee is found to be incorrect. The Commissioner and the Tribunal relied upon the decision of the Apex Court in the case of **Commissioner of Income-Tax Vs Reliance Petroproducts Pvt. Ltd.** -[2010] 322 ITR 158 (SC) to

hold that in the present facts no penalty is impossible.

5 Being aggrieved Revenue has approached this Court by way of the present appeal.

6 Mr.Chhotaray, learned counsel for the Revenue contended that Assessee had concealed its income and had misrepresented the facts. He submitted that the Assessee did not even bother to furnish explanation and penalty was rightly imposed. He submitted that the Tribunal mechanically applied the decision of the Apex Court in the case of **Reliance Petroproducts** (*supra*) without appreciating the factual aspects in which the decision was rendered. He submitted that the decision of the Apex Court has not laid down an absolute proposition as held by the Tribunal and if such interpretation is accepted there will be virtually no case where a penalty can be levied. He submitted that in the case of **Reliance Petroproducts** (*supra*), the Assessee therein had given an explanation, which is not the present case. He submitted that the Delhi High Court in the case of **Commissioner of Income Tax Vs Zoom Communication P. Ltd. - [2010] 327 ITR 510 (Delhi)**, reversed the order of Tribunal deleting the penalty relying on the decision of the Apex Court in **Reliance Petroproducts**(*supra*), by reading the decision of the Apex Court in the proper perspective. Mr.Chhotaray therefore submitted that the questions of law that would arise in this Appeal are, firstly: whether on facts and circumstances of the case and in law the Tribunal was justified in

upholding the order of Commissioner (Appeals) deleting the penalty imposed by the Assessing Officer, and secondly : whether the Tribunal was right in law in deleting the penalty and upholding the order of the Commissioner of Income-Tax ignoring that Assessee had wilfully claimed deductions in respect of interest on borrowed funds which were diverted to sister concern and not for the business.

7 Mr. Atul Jasani, learned counsel for the Respondent - Assessee submitted that no notice was issued to the Assessee before imposing the penalty and this ground was taken by the Assessee in the appeal. He submitted that, both the Assessee and its sister concerns, were loss making units and the Assessee bonafide felt that the Assessee was covered by the decision of the Apex Court in the case of **S.A Developers** (*supra*). He submitted that the Assessee had contested the issue upto the Tribunal and had also succeeded in as much as the matter was remanded back to the Assessing Officer. It is therefore submitted that no penalty could be levied as the actions of the Assessee were bonafide.

8 Section 271(1)(c) of the Act lays down that the penalty can be imposed if the authority is satisfied that any person has concealed particulars of his income or furnished inaccurate particulars of such income. The Apex Court in **Reliance Petroproducts** (*supra*) applied the test of strict interpretation. It held that the plain language of the provision shows that, in order

to be covered by this provision there has to be concealment and that the assessee must have furnished inaccurate particulars. The Apex Court held that by no stretch of imagination making an incorrect claim in law, would amount to furnishing inaccurate particulars.

9 Thus, above conditions under Section 271(1)(c) must exist before the penalty can be imposed. Mr.Chhotaray tried to widen the scope of the appeal by submitting that the decision of the Apex Court should be interpreted in such a manner that there is no scope of misuse especially since minuscule number of cases are picked up for scrutiny. Because small number of cases are picked up for scrutiny does not mean that rigors of the provision are diluted. Whether a particular person has concealed income or has deliberately furnished inaccurate particulars, would depend on facts of each case. In the present case we are concerned only with the finding that there has been no concealment and furnishing of incorrect particulars by the present assessee.

10 Though the Assessee had given interest free advances to it's sister concerns and that it was disallowed by the Assessing Officer, the Assessee had challenged the same by instituting the proceedings which were taken up to the Tribunal. The Tribunal had set aside the order of the Assessing Officer and restored the same back to the Assessing Officer. Therefore, the interpretation placed by Assessee on the provisions of law, while taking the actions in question, cannot be considered to be dishonest, malafide

and amounting concealment of facts. Even the Assessing Officer in the order imposing penalty has noted that commercial expediency was not proved beyond doubt. The Assessing Officer while imposing penalty has not rendered a conclusive finding that there was an active concealment or deliberate furnishing of inaccurate particulars. These parameters had to be fulfilled before imposing penalty on the Assessee.

11 The case of **Commissioner of Income Tax Vs. Zoom Communications P.Ltd.** -[2010] 327 ITR 510 (Delhi) relied upon by Mr.Chhotaray is clearly distinguishable on facts. In that case the Assessee had conceded before Assessing Officer that it's action of claiming revenue deductions was not correct at all. It was not the case of the Assessee therein, throughout the proceedings, that the deductions carried out by the Assessee was a debatable issue. The Delhi High Court noted that even before it the Assessee could not explain the circumstances and it's conduct.

12 In the present case therefore, when the Assessee had bonafide pleaded that it was covered by a particular position of law and that one authority i.e. the Tribunal had passed certain orders in it's favour during the assessment proceedings, it could not be said that the Assessee fell within the ambit of Section 271(1)(c). The assertion of the Assessee that it was not served with a notice and therefore cannot be blamed for not filing a reply, has gone uncontroverted. This being the position we do not find any perversity with the decision of the Commissioner (Appeals) and the

Tribunal in deleting the penalty imposed by the Assessing Officer. In any case this is a possible view of the matter upon appreciating the evidence. In the circumstances, both the grounds urged by the Revenue cannot be termed as substantial questions of law.

The Appeal is dismissed.

(N.M.Jamdar, J.)

(M.S.Sanklecha, J.)

Bombay High Court