IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 216 of 2004

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE K.J.THAKER

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MITSU INDUSTRIES LTD.....Appellant(s)

Versus

DY.C.I.T.....Opponent(s)

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Appearance:

MR RK PATEL, ADVOCATE for the Appellant(s) No. 1

MR SUDHIR M MEHTA, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 16/10/2014

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. Being aggrieved and dissatisfied with the impugned judgement and order dated 29.01.2004 passed by the Income Tax Appellate Tribunal, Ahmedabad 'C' Bench (Tribunal) in Income Tax Appeal No. 2023/AHD/1998 for the assessment year 1992-93, the assessee has preferred the present tax appeal.

2. The facts leading to the present tax appeal in a nutshell are set out as under:

2.1 The assessee Company filed its return of income for the assessment year 1992-93. Notice was issued by the revenue for framing scrutiny assessment and ultimately after considering the submissions assessment order was passed on 22.03.1995 after making certain additions/disallowances. Two of the major additions were in respect of unsecured loan of Rs. 4,02,000/- from promoter and investment made by him in share capital which was brought in by way of additional share capital of Rs. 2,01,000/- . However, the Assessing Officer initiated penalty proceedings u/s 271(1)(c) of the Act.

2.2 Being aggrieved by the assessment order, the appellant preferred first appeal before CIT(A) who dismissed the appeal vide order dated 14.02.1997. Thereafter the Assessing Officer started penalty proceedings and the penalty order was also appeal before CIT(A) who dismissed the same.

the appellant preferred second appeal before the Tribunal and the Tribunal vide impugned order upheld the penalty order. Being aggrieved by the said order, the present appeal is filed.

3. Mr. R.K. Patel, learned advocate appearing for the assessee submitted that the Tribunal has seriously erred in interpreting the provisions of section 271(1)(c) of the Act based on the judgement of Calcutta High Court. He submitted that the Tribunal has not expressed any opinion on the factual aspect of the matter where the penalty proceedings is commenced in the year 1997 when the original promoter Director was not in the management of the Company and penalty proceedings u/s 271(1)(c) of the Act having direct nexus to the conduct of the concerned assessee, the same cannot be invoked against the appellant company for the relevant assessment year. In support of his submission he has relied upon the decisions of this Court in the cases of **New Sorathia Engg. Co. vs. Commissioner of Income-Tax reported in 282 ITR 642 (Guj)** and in the case of **Commissioner of Income Tax vs. Manu Engineering Works reported in 122 ITR 306 (Guj).**

4. Mr. Sudhir Mehta, learned advocate appearing for the revenue submitted that the Tribunal is justified in passing the impugned order inasmuch as the assessee failed to prove the genuineness of the transactions under consideration and the creditworthiness of the loaner. He submitted that inspite of repeated opportunities given to the assessee the assessee could not explain reasonable cause. Mr. Mehta submitted that the Tribunal was justified in relying upon the Calcutta High Court decision in the case of **M/s. Shanker Industries**

vs. CIT Calcutta reported in 114 ITR 689.

5. The present appeal was admitted for consideration of the following substantial question of law:

> **"Whether on the facts and in the circumstances of the case and in light of documentary evidence on record and explanation of the appellant the Tribunal was justified in law in confirming the levy of penalty u/s. 271(1)(c) of the Income Tax Act, 1961 at Rs. 3,46,725/-?"**

6. We have heard learned advocates for both the sides and perused the orders passed by the CIT as well as the Tribunal. The relevant portion of the Tribunal's order impugned in the present appeal is reproduced hereunder:

> "9. The expression "the amount of tax sought to be evaded" has been defined in the newly introduced Explanation 4 to section 271(1)(c) for the purpose of section 271(i)(iii) which was introduced w.e.f. 1/4/76 by Taxation Laws (Amendment) Act, 1975. The said expression contemplates that where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished exceeds the total income, the base of quantum would be the tax that would have been chargeable on the income concealed, had such income been the total income. Therefore, after 1-4-76 the quantum of penalty is linked with the amount of tax sought to be evaded. Therefore, Explanation and applies to cases where the amount of income in respect of which particulars have been concealed of inaccurate particulars have been furnished has the effect of converting that loss into income. The above view is supported by the

> decision of Bombay High Court in the case of CIT vs. Chemiequip Ltd. 182 CTR (Bom) 144. the decisions relied upon by the assessee in written submissions are distinguishable on facts.
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> 10. Apart from above judicial view, the finding of AO that the assessee had introduced bogus cash credits in the form of unsecured loan and had invested in shares which were not explained satisfactorily neither at the time of assessment proceedings nor at the time of penalty proceedings. Under the circumstances we are of the view that penalty u/s. 271(i)(c) has been correctly levied by AO and then confirmed by the CIT(A)."

7. As a result of hearing and perusal of records, we find that the Tribunal erred in coming to the conclusion that penalty u/s 271 of the Act was rightly imposed upon the assessee. In this context it shall be relevant to peruse the decisions of this court in the cases of Manu Eng. Works (supra) and New Sorathia Engg. Co (supra). This Court in the case of New Sorathia Engg. Co. (supra) has considered the decision of the Calcutta High Court in the case of M/s. Shankar Industries (supra) and also the decision of this court in Manu Engg. Works (supra). This Court in New Sorathia Engg. Co. (supra) has observed as under:

> "10. In the facts of the present case the subtle difference between the two stages would not matter. It is nobody's case, and it is not possible to contend, that the Tribunal was not bound by a decision of the jurisdictional High Court, especially when its attention was invited to the said decision. Therefore, whether the Tribunal has recorded any finding or not becomes immaterial. In the facts as are available on record it is apparent that the ratio of a decision of this Court in the case of Commissioner of Income-tax Vs. (supra) applies on all fours.

11. In the case of Commissioner of Income-tax Vs. Manu Engineering Works (supra) this is what is laid down by this Court at Page No.310 of the Reports:

> "..... We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order: "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income". Now, the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down."

12. The penalty order and the order of Commissioner (Appeals) show that no clear-cut finding has been reached. The Tribunal has failed to appreciate this legal issue. Applying the ratio to the facts of the case it is apparent that the order of penalty cannot be sustained and the Tribunal could not have sustained the same. The Tribunal having failed to take into consideration and deal with the decision of the jurisdictional High Court it would constitute an error in law which goes to the very basis of the controversy involved and hence, the impugned order of the Tribunal cannot be upheld.

13. In the view that the Court has taken it is not necessary to reproduce and deal with other contentions raised by the learned counsel on facts and merits of the matter in the fact situation.

> 14. In the result, the question is answered in the negative i.e. in favour of the assessee and against the revenue. The Tribunal was not right in upholding the penalty under Section 271(1)(c) of the Act, for the reasons stated hereinbefore. "

8. Even on the assumption that the initial onus lies on the appellant, the appellant sufficiently discharged its burden by placing explanation and evidence from time to time before the lower authorities. It appears that no inquiry was made in case of lenders. In view of the aforesaid decision, we are of the opinion that the Tribunal committed an error in imposing penalty u/s 271(1)(c) of the Act and for the reasons stated hereinabove we answer the question in the negative i.e. in favour of the assessee and against the Revenue.

9. In the premises aforesaid, appeal is allowed accordingly. The impugned penalty orders are hereby quashed and set aside. No costs.

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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