(2011) 05 CAL CK 0071

Calcutta High Court

Case No: Income Tax A. No. 402 of 2005

EIH Limited		APPELLANT
	Vs	
Commissioner of Income Tax		RESPONDENT

Date of Decision: May 4, 2011

Acts Referred:

- Income Tax Act, 1961 - Section 260A, 263, 271(1), 276C, 80HHC

Citation: (2012) 211 TAXMAN 130

Hon'ble Judges: Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: R.N. Bajoria, for the Appellant;Asha Gourisaria Gutgutia, for the Respondent

Final Decision: Allowed

Judgement

Bhaskar Bhattacharya, J.
This appeal u/s 260A of the income tax Act, 1961 is at the instance of an Assessee and is directed against an order dated 8th August, 2005, passed by the income tax Appellate Tribunal, "D" Bench, Kolkata, in ITA No. 283/Kol/2005 for the Assessment Year 1998-99 allowing an appeal filed by the Revenue against the order of CIT (Appeals) by which the CIT (Appeals) set aside an order of imposition of penalty u/s 271(1)(c) of the income tax Act amounting to Rs. 5,52,00,300/-.

2. Being dissatisfied, the Assessee has come up with the present appeal u/s 260A of the Act.

3. A Division Bench of this Court at the time of admission of this appeal formulated the following two substantial questions of law:

(i) Whether the purported finding of the Tribunal that the claim made by your Petitioner in the revised return for deduction u/s 80HHC of the Act in respect of the foreign flight catering business was not bona fide or that the said claim was found to be false in assessment proceeding are perverse and based on no material

whatsoever.

"(ii) Whether making a claim of deduction u/s 80HHC of the Act in the revised return in respect of the foreign flight catering business could attract the penalty u/s 271(1)(c) of the Act and imposition of such penalty is sustainable in law.

4. The facts giving rise to filing of this appeal may be summed up thus:

a) For the Assessment Year 1998-99, the Assessee filed its return of income on November 30, 1998 disclosing the total income of Rs. 39,61,89,047/-. The said return was revised by the Assessee on December 17, 1999 and the income disclosed in such revised return was shown to be Rs. 38,98,00,700/-.

b) The said revised return was filed after making a claim of deduction u/s 80HHC of the Act in respect of the income derived from the foreign catering business. Along with the revised return, the Assessee duly filed the auditor''s certificate in Form 10CCAC in support of such claim for deduction.

c) The basis of the said revised return and the claim of deduction u/s 80HHC of the Act was that the Assessee came to know of a decision of the Mumbai Bench of the income tax Appellate Tribunal in the case of Indian Hotels Limited which was also engaged in the business of foreign flight catering business. In the said decision, the Tribunal set aside the order passed by the Commissioner of Income tax u/s 263 of the Act whereby the Commissioner treated allowance of such deduction u/s 80HHC of the Act by the Assessing Officer in respect of the foreign flight catering business as erroneous and prejudicial to the interest of the Revenue. The Mumbai Bench of the Tribunal held that the order of the Commissioner u/s 263 of the Act in that case was not sustainable since the deduction u/s 80HHC of the Act in respect of the foreign flight catering business was allowed by the Assessing Officer after full investigation and it could not be said that the Assessing Officer''s order was erroneous having been made without proper enquiry and/or investigation. The Mumbai Bench of the Tribunal in the said case, however, did not deal with the merits of the claim for deduction u/s 80HHC of the Act in respect of the foreign flight catering business of the Indian Hotels.

d) The Assessing Officer disallowed the claim made by the Assessee in the revised return for deduction u/s 80HHC of the Act and such disallowance was upheld in the appeal by the CIT (A) and on further appeal by the Assessee.

e) Against such order of the Tribunal disallowing the claim u/s 80HHC of the Act, the Assessee filed an appeal u/s 260A of the Act before this Court which was admitted and is pending. The appeal was admitted by this Court on June 8, 2004.

f) The Assessing Officer, in the meantime, initiated proceedings u/s 271(1)(c) of the Act against the Assessee for making such claim for deduction u/s 80HHC of the Act in the revised return and by an order dated September 17, 2004 imposed penalty of Rs. 5,52,00,300/- being the maximum penalty under the said section.

g) Against the said order of the Assessing Officer u/s 271(1)(c) of the Act, the Assessee preferred an appeal before the CIT (A) and the said appellate authority by his order dated November 29, 2004 set aside the order imposing penalty u/s 271(1)(c) of the Act.

h) Against the said order of the CIT (A), the Revenue filed an appeal before the Tribunal and by the order impugned in this appeal, the Tribunal set aside the order of the CIT (A) with a direction, however, for reducing the amount of penalty from three times the tax involved to the amount of tax.

5. Being dissatisfied, the Assessee has come up with the present appeal.

6. Mr. Bajoria, the learned Senior counsel appearing on behalf of the Appellant, has strongly criticized the order passed by the Tribunal below by contending that the Tribunal below without any just reason set aside the order passed by the CIT (A) and restoring the penalty merely because his client unsuccessfully lodged a claim u/s 80HHC of the Act. Mr. Bajoria contends that in order to apply the provision contained in Section 271(1)(c) of the Act, it must be proved that the ingredients of the said section are present. In other words, it must be proved that either his client had concealed particulars of his income or furnished inaccurate particulars of such income. Mr. Bajoria contends that his client being encouraged by the fact that the Revenue had granted similar relief to another Assessee doing the same type of business as done by the Assessee and the subsequent order u/s 263 of the Act for rectification of such relief had been set aside by the Mumbai Tribunal by restoring the benefit, filed the revised return and thus, there was no justification of imposing penalty in the fact of the present case. Mr. Bajoria submits that even if it is assumed for the sake of argument that the claim of his client u/s 80HHC was not tenable, such fact cannot be a ground for imposition of penalty when there is no finding recorded either by the Assessing Officer or by the Tribunal that his client concealed any material or furnished any inaccurate particulars in its revised return. In support of such contention, Mr. Bajoria relies upon the decision of the Supreme Court in the case of Commissioner of Income tax v. Reliance Petro-products Pvt. Ltd., reported in [2010] 322 158 (SC). Mr. Bajoria also relied upon the decision of the Mumbai Tribunal in the case of Indian Hotels Co. Ltd. v. Deputy Commissioner of income tax, reported in (2004) 86 TTJ (Mum) 195 granting relief u/s 80HHC of the Act to an Assessee doing the similar type of business.

7. Mrs. Gutgutia, the learned Advocate appearing on behalf of the Revenue, has, on the other hand, opposed the aforesaid contention of Mr. Bajoria and has supported the order passed by the Tribunal. According to Mrs. Gutgutia, the Assessee knowing well that it had not exported the items, deliberately made wrong claim u/s 80HHC and thus, the Tribunal below rightly set aside the order passed by the CIT (A) and affirmed the order passed by the Assessing Officer with slight modification as to the quantum of penalty. Mrs. Gutgutia submits that the fact that the claim of the Assessee u/s 80HHC having been refused up to the Tribunal was sufficient to initiate

proceeding u/s 271(1)(c) of the Act. Mrs. Gutgutia, thus, prays for dismissal of the appeal.

8. Therefore, the only question that arises for determination in this appeal is whether the Tribunal was justified in setting aside the order of the CIT (A) and restoring the order of the Assessing Officer with reduced amount of penalty.

9. Before entering into the question, we keep on record that as a separate appeal u/s 260A of the Act at the instance of the Assessee challenging the order of the Tribunal refusing the benefit u/s 80HHC is pending before this Court, we have in this case, not gone into the question whether the Assessee is really entitled to the said benefit and we have decided to proceed with the assumption that the Assessee unsuccessfully claimed the said benefit.

10. After hearing the learned Counsel for the parties and after going through the materials on record, we agree with Mr. Bajoria, the learned Senior Advocate appearing on behalf of the Assessee, that merely because a claim of an Assessee did not find favour with the assessing authority, the same cannot, or in any case should not attract the provision contained in Section 271(1)(c) of the Act. In this connection, we may profitably refer to the decision of the Supreme Court in the case of C.I.T., Ahmedabad v. Reliance Petro-products Pvt. Ltd (supra), relied upon by Mr. Bajoria where the said Court in details dealt with provisions contained in Section 271(1)(c) of the Act and its applicability as well as the earlier decisions of the said Court on the points. The following observations of the Court in that case are relevant and are quoted below:

A glance at this provision would suggest that in order to be covered, there has to be concealment of the particulars of the income of the Assessee. Secondly, the Assessee must have furnished inaccurate particulars of his income. Present is not the case of concealment of the income. That is not the case of the Revenue either. However, the Learned Counsel for Revenue suggested that by making incorrect claim for the expenditure on interest, the Assessee has furnished inaccurate particulars of the income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the Section 271(1)(c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the Return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the Assessee cannot be held guilty of furnishing inaccurate particulars. The Learned Counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the Assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination,

making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In Commissioner of Income Tax, Delhi Vs. Atul Mohan Bindal, , where this Court was considering the same provision, the Court observed that the Assessing Officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This Court referred to another decision of this Court in Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, , as also, the decision in Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, and reiterated in para 13 that:

13. It goes without saying that for applicability of Section 271(1)(c), conditions stated therein must exist.

Therefore, it is obvious that it must be shown that the conditions u/s 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the Return filed because that is the only document, where the Assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. In Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another, 1280: AIR 2007 SCW 4323, this Court explained the terms "concealment of income" and "furnishing inaccurate particulars". The Court went on to hold therein that in order to attract the penalty u/s 271(1)(c), mens rea was necessary, as according to the Court, the word "inaccurate" signified a deliberate act or omission on behalf of the Assessee. It went on to hold that Clause (iii) of Section 271(1) provided for a discretionary jurisdiction upon the Assessing Authority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term "inaccurate particulars" was not defined anywhere in the Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars. It was further held that the Assessee must be found to have failed to prove that his explanation is not only not bona fide but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the Assessee had furnished the particulars of his income. The Court ultimately went on to hold that the element of mens rea was essential. It was only on the point of mens rea that the judgment in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. AIR 2007 SC (Supp) 1280 : AIR 2007 SCW 4323 was upset. In Union of India v. Dharamendra Textile Processors AIR 2008 SC (Supp) 668 : AIR 2008 SCW 8038 (cited supra), after quoting from Section 271 extensively and also considering Section 271(1)(c), the Court came to the conclusion that since Section 271(1)(c) indicated the element of strict liability on the Assessee for the concealment or for giving inaccurate particulars while filing Return, there was no necessity of mens rea. The Court went on to hold that the objective behind enactment of Section 271(1)(c) read with Explanations indicated with the said Section

was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution u/s 276-C of the Act. The basic reason why decision in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. (cited supra) was overruled by this Court in Union of India v. Dharamendra Textile Processors (cited supra), was that according to this Court the effect and difference between Section 271(1)(c) and Section 276-C of the Act was lost sight of in case of Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. (cited supra). However, it must be pointed out that in Union of India v. Dharamendra Textile Processors (cited supra), no fault was found with the reasoning in the decision in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. (cited supra), where the Court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Anr. (cited supra) to the effect that mens rea was an essential ingredient for the penalty u/s 271(1)(c) that the decision in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai and Ann (cited supra) was overruled.

We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the Assessee has given inaccurate particulars. In Webster''s Dictionary, the word "inaccurate" has been defined as:

not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript

We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the Assessee in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty u/s 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the Assessee. Such claim made in the Return cannot amount to the inaccurate particulars.

(Emphasis supplied by us)

11. Applying the aforesaid principles, we called upon Mrs. Gutgutia, the learned Advocate appearing on behalf of the Revenue, to point out to us the incorrect or false particulars of the Assessee in the revised return which she could not. She simply reiterated her contention that the Assessee with mala fide intention raised an absurd plea of the benefit u/s 80HHC of the Act for the purpose of defrauding the Revenue and such plea having been found to be not tenable up to the stage of the

Tribunal, the Assessing Officer imposed the penalty.

12. In the case before us, we find that in the original return, no claim u/s 80HHC of the Act was made. As pointed out earlier, the Assessee having come to know that another Assessee doing similar type of business of airport kitchen was given the benefit of Section 80HHC of the Act and an order u/s 263 by the Commissioner recalling such benefit was restored by the Mumbai Tribunal, the Assessee submitted the revised return claiming such benefit. The fact that such benefit has really been given to another Assessee in the similar circumstances has not been denied. Thus, merely because the Assessee claimed such benefit being encouraged by such fact cannot lead to penalty u/s 271(1)(c) of the Act when there is no false or inaccurate particular submitted by the Assessee.

13. We, thus, find that the case before us is covered by the decision of the Supreme court in the case of Reliance Petro-products Pvt. Ltd (supra), and the Tribunal below committed gross error of law in setting aside the order of the CIT (A) in the absence of any finding that any inaccurate particular was submitted by the Assessee. Merely because, the Tribunal found that the claim was not tenable in the eye of law was not a ground of imposing the penalty.

14. We, therefore, set aside the order of the Tribunal and restore the one passed by the CIT (A) by setting aside the order of penalty.

15. Appeal is, thus, allowed by answering the first question in the affirmative and the second question in the negative, both against the Revenue.

16. In the facts and circumstances, there will be, however, no order as to costs.

I agree.