Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5769 OF 2009
(Arising out of SLP(C) No. 31192/2008)

C.I.T., Delhi …Appellant

Versus

Atul Mohan Bindal …Respondent

JUDGEMENT

R.M. Lodha, J.

Delay condoned.

2. Leave granted.

3. The revenue has come up in appeal by special leave aggrieved by the judgement of the High Court of Delhi whereby the High Court dismissed their appeal under Section 260A of the Income Tax act, 1961 (for short, "the Act") on January 25, 2008 and upheld the order dated December 22, 2006 passed by the Income Tax Appellate Tribunal, Delhi Bench 'H', New Delhi.

4. Atul Mohan Bindal - assessee filed return of his income for Assessment Year 2002-03 on August 8, 2002 declaring his total income Rs.1,98,50,021/-. In the assessment proceedings u/s 143, a notice alongwith questionnaire was issued to him by the Assessing Officer on November 29, 2002. Pursuant thereto, assessee attended the assessment proceedings and furnished the requisite details. During the assessment proceedings, it transpired that assessee worked with M/s DHL International(S) PTE Ltd., Singapore during the previous year and was paid salary in Singapore amounting to US$ 36,680.79 equivalent to Rs.17,81,952/-. The assessee explained that an amount of US $ 8199.87 (Rs.3,98,350/-) was deducted as tax from the aforesaid salary income and having paid tax on salary income earned in Singapore, he was of the view that the said income was not liable to be included in the total income in India. He however, offered salary income of Rs. 17,81,952/- to be included in his total income. The assessee was also found to have received an amount of Rs. 5,00,000/- from his erstwhile employer M/s Honeywell International (India) Pvt. Ltd. in the previous year. His explanation was that the said amount was exempted under Section 10(10 B) of the Act being retrenchment compensation. According to the Assessing Officer, that amount could not be exempted u/s 10

(10B) as the assessee was not a workman. The assessee also earned interest income of Rs. 22,812/- from Bank of India which was not included by him in the total income but he offered for tax the said amount. The Assessing Officer, accordingly, added Rs.17,81,952/-, Rs.5,00,000/- and Rs.22,812/- to the income declared by the assessee in the return and assessed the total income of assessee at Rs.2,21,54,785/-. Penalty proceedings under Section 271(1)(c) were initiated separately and penalty of Rs.7,75,211/- was imposed under Section 271(1)(c) by the Assessing Officer vide Order dated March 16, 2003.

5. The assessee accepted the order of assessment but challenged the order of penalty in appeal before the CIT (Appeals) XXV, New Delhi.

6. After hearing the assessee and the departmental representative, the CIT (Appeals) XXV, New Delhi allowed the appeal and set aside the order of penalty vide his order dated August 22, 2005. The CIT (appeals) held that the assessee has neither concealed the particulars of his income nor he furnished any inaccurate particulars thereof. This is what the CIT (Appeals) held:

> "… I believe that this is a case of unintentional and inadvertent omission and therefore, it is not a fit case for levy of penalty u/s. 271(1)(c) of the Act as the

> assessee has not concealed the particulars of his income; nor has he furnished any inaccurate particulars thereof. As can be seen from a perusal of the impugned order, the penalty has been levied with reference to firstly, the addition disallowing the claim of Retrenchment compensation of Rs.5,00,000/- made u/s 10(10B) of the Act, secondly, the salary received in Singapore for services rendered outside India from December to March 2002 amounting to Rs. 17,81,952/- offered by the appellant in the course of assessment proceedings and thirdly the interest income of Rs. 22,812/- also offered for tax in the revised return filed during the course of assessment proceedings. As regards the former, the AO appears to be completely satisfied as regard the genuineness of the reasons that necessitated the revision. As regard the second, the issue involved difference of opinion even between two different benches of the Apex Court, and thirdly, the A.O. again seems to be satisfied about the appellant's reply in this connection. In any case, the additions were made on the basis of the particulars furnished by the appellant and not discovered independently by the A.O.
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> 5.1 That the appellant had a bona fide belief of the non-taxability of the salary income earned in Singapore where tax- withholding had taken place and India had DTAA with Singapore, so he did not include this receipt in his salary income cannot be rejected out of hand. During assessment proceedings however, assessee offered this salary receipt for taxation as per IT Act, 1961. Therefore, an amount of Rs. 17,81,952/- was included in the total income of the assessee. In such setting of facts, I am afraid, the impugned addition may not lead to concealment of income or furnishing of inaccurate particulars thereof."

7. The Revenue challenged the order of CIT (Appeals) before the Income Tax Appellate Tribunal, Delhi (for short, "the Tribunal").

8. The Tribunal heard the departmental representative and the authorized representative of the assessee and by its order dated December 22, 2006 upheld the order of CIT (Appeals). The Tribunal considered the matter thus:

> " 12. On a careful consideration of the rival submissions, we are of the view that the CIT (Appeals) was justified in canceling the penalty in respect of all the three items. So far as the salary received in Singapore from DHL is concerned, it is true that since the assessee was a resident of India, the salary received in Singapore should be taxed in his hands. The claim of the assessee was that he was under a bona fide though mistaken impression that because of the existence of the DTAA between India and Singapore, if taxes are deducted from salary income in Singapore than the said income cannot be taxed by the Indian Income tax authorities. Though, considering the position occupied by the assessee (as vice-president/general manager of a multinational company drawing a huge salary) it is expected that he would have been advised by a professional with regard to his taxation matters and therefore, it somewhat difficult to accept the explanation, more particularly when the assessee knew of the existence of a double taxation avoidance agreement between India and Singapore, still one can perhaps extend the benefits of doubt to him because the moment he was informed by the Assessing Officer that is not the correct legal position, the assessee included the salary in the total income. Further, there is no dispute that the assessee was eligible to get credit for the taxes paid in Singapore. In fact, the Assessing Officer has acknowledge the same in the assessment order itself. As regards the claim for exemption of the retrenchment compensation received by the assessee, the CIT Appeals) is right in saying that the claim was on account of the opinion bona fide and honestly entertained by the assessee that he is a workman and, therefore, the exemption is available. The assessee's claim that he is a workman was disputed by the Assessing Officer and he referred to the definition of the workman as per the Industrial

> Dispute act, 1947 to reject the assessee's claim. Here also, it is a case of a difference of opinion as regards the interpretation of the work 'workman' for which no penalty is imposable. At best, it can only be said that the assessee did not take pains to study the Industrial Disputes act and to find out how the work 'workman' is defined therein. Lastly, with regard to the claim of interest banks, since the bank certificates were initially not available to the assessee, it was not included in the return. The omission thus seems to be due to reasons beyond the assessee's control. Moverover, in respect of all the three items, the CIT (Appeals) has recorded a finding in paragraph 6 of his order that all the facts were disclosed by the assessee in the annexure to the return and the information leading to the additions was taken by the Assessing Officer only from the return filed by the assessee and that such information was not found to be false. Thus, there has been no failure on the part of the assessee to declare all the facts before the Assessing Officer. We are, therefore, in agreement with the view taken by the CIT (Appeals) that this is not a case where the assessee can be said to have concealed his income or furnished inaccurate particulars even within the meaning of Explanation 1 to Section 271(1)(c)."

9. The revenue filed appeal u/s 260A before the High Court of Delhi. The High Court considered the question whether the Assessing Officer had recorded a valid satisfaction for initiating penalty proceedings under Section 271(1)(c) of the Act. Inter alia, relying upon a decision of that Court in *Commissioner of Income Tax vs. Ram Commercial Enterprises Ltd.* and noticing that Ram Commercial Enterprises has been approved by this Court in *Dilip N. Shroff vs. Joint Commissioner of Income Tax*[1], and T. Ashok Pai

[1] *(2007) 291 ITR 519 (SC)*

vs. Commissioner of Income Tax[2]*,* held that from the reading of the assessment order, it was not discernible as to why the Assessing Officer chose to initiate proceedings against the assessee and under which part of Section 271(1)(c). The High Court, therefore, accepted the view of the Tribunal and CIT (Appeals) and dismissed the appeal of the Revenue with cost of Rs. 5,000/-.

10. Section 271(1)(c) as was operative during the relevant year reads thus:

> "271. (1) If the Assessing Officer or the (***) (Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person.
>
> (a) ……..
> (b) ……..
> (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,
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> (i) …….
>
> (ii) ……
> (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 (three times), 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.
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> (***)

[2] (2007) 292 ITR 11 (SC)

(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) 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.

……."

11. A close look at Section 271(1) (c) and Explanation (1) appended thereto would show that in the course of any proceedings under the Act, inter alia, if the Assessing Officer is satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income, such person may be directed to pay penalty. The quantum of penalty is prescribed in Clause (iii). Explanation 1, appended to section 271(1) provides that if that person fails to offer an explanation or the explanation offered by such person is found to be false or the explanation offered by him is not substantiated and he fails to prove that such explanation is bona fide and that all the facts relating the same and material to the computation of his total income has been disclosed by him, for the

purposes of Section 271(1)(c), the amount added or disallowed in computing the total income is deemed to represent the concealed income. The penalty spoken of in Section 271(1)(c) is neither criminal nor quasi criminal but a civil liability; albeit a strict liability. Such liability being civil in nature, mens rea is not essential.

12. In the case of *Union of India and Ors. vs. Dharamendra Textile Processors and Ors*[3], a three judge Bench of this Court held that *Dilip N. Shroff* did not lay down correct law as the difference between Section 271(1)(c) and Section 276(c) of the Act was lost sight of. The Court held that the explanation appended to Section 271(1)(c) indicates element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The Court held thus:

> "The Explanations appended to Section 271(1)(c) of the Income Tax Act, 1961, indicate the elements of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The judgment in Dilip N. Shroff case (supra) has not considered the effect and relevance of Section 276 (c) of the I.T. Act. The object behind the enactment of Section 271(1)(c) read with Explanations indicates that the 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 276 (c)."

[3] (2008) 306 ITR 277

13. The decision of this Court in *Dharamendra Textile Processors* has been explained recently by this Court in the case of *Union of India vs. M/s Rajasthan Spinning & Weaving Mills*[4] thus:

> "20. At this stage, we need to examine the recent decision of this court in *Dharmendra Textile(supra).* In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textiles and we see no reason to understand or read that decision in that manner. In Dharmendra Textile the Court framed the five issues before it, in paragraph 2 of the decision as follows:
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> "2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai and Another [(2007) 8 SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the 'Act') inserted by Finance Act 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assess on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the 'IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules,

[4] (2009) 8 SCALE 231

1944 (in short the 'Rules') and a decision of this court in Chairman, SEBI vs. Shriram Mutual Fund & Anr. {2006 (5) SCC 361) and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11 AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench"

After referring to a number of decisions on interpretation and construction of statutory interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows:

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered……"

21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11C would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows:

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in Section 11 AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under

> section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or ;the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to willful action. According to learned counsel which was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of section 11AC would depend upon the existence or otherwise of; the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides."

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

15. Insofar as the present case is concerned, as noticed above, the High Court relied upon its earlier decision in *Ram Commercial Enterprises* which is said to have been approved by this Court in *Dililp N. Shroff.* However, *Dillip N. Shroff* has been held to be not laying down good law in *Dharamendra Textiles. Dharamendra Textiles* is explained by this Court in *Rajasthan Spining and Weaving Mills.* Having thoughtfully considered the matter, in our judgment, the matter needs to be reconsidered by the High Court in the light of the decisions of this Court in *Dharamendra Textiles and Rajasthan Spinning and Weaving Mills.*

16. In the result, appeal is allowed and the judgment of the High Court of Delhi passed on January 25, 2008 is set aside. The matter is remitted back to the High Court for fresh consideration and decision as indicated above. Since the assessee has not chosen to appear, no order as to costs.

……J
(Tarun Chatterjee)

……..J
(R. M. Lodha)

New Delhi
August 24, 2009.