UNREPORTABLE

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA NO. 221 OF 2006

% *Reserved on : July 21, 2009*
*Pronounced on : August 19, 2009*

Commissioner of Income Tax
Delhi-IV, New Delhi . . . Petitioner

through : Ms. Prem Lata Bansal with
Ms. Anshul Sharma and
Mr. Paras Chaudhary, Advocates

*VERSUS*

M/s. Dass Trading & Holding (P) Ltd. . . . Respondent

through : Mr. Arun Khosla, Advocate

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. Following two substantial questions of law were framed in this case :-

> (a) Whether ITAT was correct in law in deleting the penalty of Rs.2,17,268/- imposed by the Assessing Officer under Section 27(1)(c) of the Act?
>
> (b) Whether ITAT was correct in law in deleting the penalty on the ground that no satisfaction was recorded by the Assessing Officer in the assessment order whereas the necessary satisfaction is clearly discernible as envisaged by the Supreme Court in 86 ITR 557 in the assessment order?"

2. Insofar as question of law No. (b) is concerned, having regard to the amendment to Section 1(b) of Section 271 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') by the Finance Act, 2008 with retrospective effect from 1.4.1989, it was observed that it was

not necessary for the Assessing Authority to specifically record satisfaction while initiating penalty proceedings under Section 271 of the Act. This question was accordingly answered on 21.7.2009 itself while framing the aforesaid questions. Arguments were heard on question of law No. (a) above and the judgment reserved. Therefore, we proceed to decide that question of law.

3. The relevant facts which are to be taken note of in answering the aforesaid question are recapitulated below.

4. This case relates to the assessment year 1994-95 for which the respondent herein (hereinafter referred to as the assessee) had returned its income at Rs.2,790/-. Before the income could be assessed by the Assessing Officer (AO) on the basis of that return, a report was received by the AO from ADI (Inv.), Unit-V that the agricultural income disclosed by the assessee was bogus. After receiving this information, the AO made extensive inquiries and in the process, statements of various persons was also recorded. Thereafter, the assessee was confronted with the material collected by the AO affording the assessee various opportunities to rebut the same and/or give its explanation thereto. However, the assessee neither appeared nor adduced any evidence in support of its claim until the assessee revised its return on 8.3.1996 offering agricultural income of Rs.3,76,222/- for taxation. The AO framed the assessment at Rs.3,89,514/- vide his orders dated 25.2.1997. While framing the said assessment order, the AO recorded that the filing of the revised

return did not absolve the assessee from provisions of Section 271(1)(c) of the Act and, therefore, initiated separate penalty proceedings. Show-cause notices dated 3.7.1997 and 11.8.1997 were accordingly issued to the assessee. The assessee filed its reply dated 17.7.1997 through its counsel. In this reply, it was *inter alia* stated that the revision of income was made by the assessee voluntarily and the taxes were paid according to the revised return and, thus, there was no *mala fide* intention on the part of the assessee to conceal the income. It was also stated that because of difficulty in getting all the necessary details due to extraordinary circumstances beyond the control of the assessee, the return was revised *suo motu*. Therefore, there was no concealment of income and, thus, no penalty was leviable. The AO did not find any credence in the said explanation, inasmuch as, as per the AO, it is only after the initial return filed by the assessee when the extensive inquiries were made by the Directorate of Investigation to verify the assessee's agricultural income and statement of various persons was also recorded by the ADI (Inv.) under Section 131 of the Act that the assessee came out with the revised return. Therefore, it could not be said that it had made revision in its income voluntarily.

Following discussion in this behalf is contained in the penalty order dated 29.8.1997 :-

> "In this case, report from ADI (Inv.) Unit-V, New Delhi was received vide his letter dated 16-5-95. It was found out by the ADI (Inv.) that the assessee company had declared bogus agricultural income and before coming to this conclusion, extensive enquiries were made by the Directorate of Investigation, New Delhi to verify the assessee's claim of agricultural income. Enquiries were also conducted at the

Village Archar, Tehsil Sikandarbad (UP) where the company had claimed to have done agricultural activities. Statement of various persons of that village, were also recorded by the ADI (Inv) u/s 131 of the Act and it transpired that the assessee company did not have any agricultural land in that village. Statement of the proprietor of M/s Shiv Bhandar Naya Bazar, Delhi was also recorded on 8-3-95 in which he categorically stated that he had given a number of entries to the various clients of one Sh. S.K. Jain, CA on commission and M/s. Dass Trading & Holdings (P) Ltd. was one of them. He further stated that he received commission only for issuing sale bills and no agricultural produce was purchased by him from M/s. Dass Trading & Holdings (P) Ltd. A number of opportunities were given by the ADI (inv.) New Delhi to the assessee company by issuing summons u/s 131 on 5-12-94, 9-12-94, 14-12-94, 9-3-95, 22-3-95 and 24-3-95 but neither anybody from the company ever attended the office nor any evidence/ explanation was filed by the assessee company to substantiate its claim of agricultural income.

In the light of the above facts, it is crystal clear that the comapny6 had not earned any agricultural income during the FY 1993-94 relevant to the AY 1994-95. Assessee's explanation that the revision of income was made voluntarily also cannot be accepted. Instead, the assessee has filed the revised return on 8-3-96 i.e. the stage when it was already established on the facts of the case that the assessee company did not have any agricultural activities and the company had just converted its unaccounted money by showing agricultural income. Hence, the filing of the revised return does not exempt the assessee from the levy of penalty u/s 271(1)(c)."

The AO, thus, concluded that the assessee had concealed the true particulars of its income and filed inaccurate proceedings in the original return to avoid tax. Thus, vide orders dated 29.8.1997, the AO imposed penalty of Rs.2,17,268/- upon the assessee.

5. In appeal preferred by the assessee against the aforesaid order, the Commissioner of Income Tax (Appeal) confirmed the penalty and dismissed the appeal vide orders dated 20.7.1998. Undeterred, the assessee approached the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal')) by way of further appeal under Section 254 of the Act. This time, the assessee was successful as the Tribunal

has reversed the orders of the CIT (A) and allowed the appeal of the assessee. Order dated 4.5.2005 passed by the Tribunal in this behalf is under challenge before us in the present appeal, which is preferred by the Revenue.

6. A perusal of the orders of the Tribunal would show that the Tribunal set aside the penalty order on two grounds :-

(a) No satisfaction was required by the AO in his assessment order to the effect that the assessee had concealed the particulars of the income to avoid the tax effect. In this behalf, the Tribunal relied upon the judgment of this Court in the case of ***CIT*** v. ***Ram Commercial Enterprises Ltd.,*** 246 ITR 568; and ***Diwan Enterprises*** v. ***CIT & Ors.,*** 246 ITR 571.

This ground, to set aside the penalty, does not hold good in view of retrospective amendment to the provisions of Section 271(1)(c), as mentioned above.

(b) The Tribunal went into the merits of the orders passed by the authorities below and noted that under similar circumstances the Tribunal had cancelled the penalty orders in the case of ***AFL Developers (P) Ltd.*** Para 7 of the orders passed in the said case was reproduced by the Tribunal wherein it was recorded as under :-

> "7. We have duly considered the rival contentions and the material on record. It is true that the revised return was filed subsequent to the issue of the questionnaire. But the assessee cannot be discredited by saying that it was cornered by its investigations. The assessee was definitely in a fix, but more so on becoming handicapped by the death of its auditor in a road accident. Not only

> that the assessee could not lay its hands on the relevant documents, but it felt suffocated by the absence of the auditor, as it was he who had audited the accounts, it was he who must have prepared and furnished the original return and it was he who could have satisfied the assessing authorities on the questions posed by them. Thus, it was the death of Shri S.K. Jain which placed the assessee on a quagmire which prompted the assessee to file a revised return offering the income of Rs.3,82,747/- for taxation. Moreover, it appears that the authorities below were carried away more by the enquiries conducted in the case of Dass Trading. It is true that as in the case of Dass Trading, in this case also the agricultural produce was shown to have been sold to M/s Shiv Bhandar. But there is no categorical finding, nor any specific enquiry made, which can suggest that in the case of the assessee also, the role of M/s Shiv Bhandar was merely that of providing book entries. The findings in the case of Dass Trading cannot be wholly relied upon to implicate the present assessee. These are after all quasi criminal proceedings, quite distinct from assessment proceedings, where the degree of proof has to be of a higher order. There is nothing wrong in presuming that had the assessee been confronted with some incriminating material before the death of Shri S.K. Jain, and for which the department had ample time, then perhaps, the assessee could have been successful in satisfying the departmental authorities. However, besides this, we are giving more weightage to the fact that investigations in the case of another company cannot be used to implicate the assessee without independent investigation in its own case and hence, we cancel the penalty sustained by the CIT (Appeals)."

7. Apart from quoting the aforesaid para, on the basis of which it is remarked by the Tribunal that the assessee deserved to succeed in this appeal, the facts of the assessee's case are not discussed at all. In these circumstances, Ms. Prem Lata Bansal, learned counsel appearing for the Revenue, made a scathing attack to the said order by submitting that the facts in the case of ***AFL Developers*** (supra), on the basis of which the penalty order was set aside, had no bearing at all and, therefore, it was neither proper nor permissible for the Tribunal to allow the appeal of the assessee based on the said case.

We find this criticism of the Revenue to the judgment of the Tribunal as well founded. In the case of ***AFL Developers*** (supra), the Tribunal noted that the said assessee could not lay its hands on the relevant documents, but it felt suffocated by the absence of the auditor as it was he who had audited the accounts and it was he who must have prepared and furnished the original return and it was he who could have satisfied the assessing authorities of the questions posed by them, but the said auditor Shri S.K. Jain died thereby placing the assessee on a quagmire.

8. It would be of interest to take note of the observations of the Tribunal in that case, to the effect that the authorities in the said case were carried away by the inquiries conducted in the case of Dass Trading, i.e. the present assessee, and thus no categorical findings were made from the said assessee. If that was the reason for setting aside the penalty orders in ***AFL Developers*** (supra), we fail to understand how on the same reasoning case of M/s. Dass Trading, i.e. the present assessee, could be decided. Even going by that order, it is clear that insofar as the present assessee is concerned, inquiries were conducted. Furthermore, the reasons given by AFL Developers for filing return, which was found to be wrong, were the same as given by the present assessee. In these circumstances, wholesome dependence on the orders passed in ***AFL Developers*** (supra), without discussing the case of the present assessee and without discussing as to how the orders of the AO or the CIT (A) were wrong, the approach

of the Tribunal is clearly erroneous and would not stand judicial scrutiny.

9. For this reason, we heard the counsel for the parties on the facts of this case.

10. We have already noted the reason which prompted the AO to conclude that the assessee had concealed the income and Ms. Prem Lata Bansal hammered the same for justifying the penalty order.

11. Mr. Arun Khosla, learned counsel appearing for the respondent/ assessee, on the other hand, submitted that it was not a case of deliberate concealment and the very fact that the assessee had revised the return *suo motu* would show that there were no *mala fides* on the part of the assessee and it was not a case of concealment. He submitted that the Tribunal had accepted the explanation that due to insufficient documents to support agricultural activities the agricultural income was shown as the income of the assessee. He referred to para 6 of the order of the Tribunal in this behalf.

12. After hearing the counsel for the parties, we are of the opinion that the penalty in this case was rightly imposed. As pointed out above, the Tribunal has not discussed the present case on its own merits. Learned counsel for the assessee is wrong when he refers to para 6 of the Tribunal's order in support of his submission that the plea of the assessee was accepted. Perusal thereof would show that in that para the only aspect discussed is that no satisfaction, as contemplated

under Section 271(1)(c) of the Act had been recorded by the AO while passing the assessment order. We are in agreement with the reason given by the AO in support of the penalty order. It is a clear case where the assessee in its original return had shown under Agricultural Income a sum of Rs.3,76,222/-, which was reduced from the total income. However, in his revised return, it accepted the fact that the aforesaid income was not agricultural income and, therefore, declared the same as taxable income. Its claim that revised return was filed *suo motu* is not that innocent as is projected to be. It is only after the ADI (Inv.), Unit-V inquired into the matter and found that the assessee had declared bogus agricultural income that the revised return was filed. It would be material to note that ADI (Inv.) had given his report vide letter No. 239 dated 9/16.5.1995. As per that report, the assessee had declared bogus agricultural income. Inquiries had revealed that the assessee had not sold any agricultural produce to M/s. Shiv Bhandar as claimed by the assessee in the original return. Statement of the proprietor of M/s. Shiv Bhandar was recorded, who had stated that he received only commission for issuing sale bills and no agricultural produce was purchased. Thus, the assessee had procured bogus bills to show sale of the agricultural produce. The report further revealed that even agricultural land in question did not exist in village Archar, Tehsil Sikandarbad (UP). The assessee was sent various letters during this inquiry, but he did not respond. Cat was out of box on the culmination of inquiry and report dated 9/16.5.1995. It is only thereafter that the revised return

was filed on 8.3.1996 when the assessee had his back to the wall and was exposed of its bogus claim made in the original return. Therefore, the alleged reason given by the assessee that the revised return was filed *suo motu* and, therefore, there was no concealment, cannot be digested.

13. In ***CIT*** v. ***Sajjan,*** 178 ITR 643, it was held that concealment of income in the original return would attract penalty even if the assessee submits a revised return before the assessment is completed.

Case would have been different had there been an inadvertent omission or error in the original return and the same is corrected by a revised return. However, in the present case, we find that there was a deliberate concealment and/or filing false return stating certain income to be agricultural income, when the assessee had not undertaken any such agricultural activity. The explanation furnished for filing the revised return is not *bona fide*.

14. Section 271(1)(c) of the Act reads as under :-

> "271. (1) If the Assessing officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person –
>
> xx xx xx
>
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or
>
> xx xx xx
>
> he may direct that such person shall pay by way of penalty, -
>
> xx xx xx"

This provision has come up for interpretation number of times. In ***CIT*** v. ***Shankar,*** 2005 ITR 140, the Court opined that offences are

committed when the particulars are concealed or inaccurate particulars are furnished in respect of the income. Cases of bogus *hundi* loans or bogus sales or purchases have been treated as that of concealment or inaccuracy in particulars of income by the judicial pronouncements {See – ***Krishna*** v. ***CIT,*** 217 ITR 645, ***Rajaram*** v. ***CIT***, 193 ITR 614 and ***Beena Metals*** v. ***CIT,*** 240 ITR 222}.

It is, thus, a clear case of giving inaccurate and false particulars and concealing the income. The ingredients of this provision stand fully satisfied.

15. We, therefore, answer question of law No. (a) in favour of the Revenue and against the assessee. Consequence of that would be to set aside the order passed by the Tribunal and allow the present appeal with costs quantified at Rs.25,000/-.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

August 19, 2009
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