

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.11.2013

Coram

The Honourable Mrs.Justice CHITRA VENKATARAMAN  
and

The Honourable Mr.Justice T.S.SIVAGNANAM

**Tax Case (Appeal) No.504 of 2009**

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Commissioner of Income Tax,  
Chennai -IV

... Appellant

-vs-

M/s.Gem Granites (Karnataka),  
18A Rajamannar Street,  
T.Nagar, Chennai 600 017.

... Respondent

Tax Case (Appeal) filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal Chennai 'A' Bench, dated 11.11.2008, ITA No.715/Mds/2007.

For Appellant : Mr.M.Swaminathan

For Respondent : Mr.M.P.Senthilkumar for  
M/s.Philip George

**ORDER**

(The Order of the Court was made by  
T.S.SIVAGNANAM, J.)

This Tax Case (Appeal) by the Revenue is directed against the order passed by the Income Tax Appellate Tribunal Chennai 'A' Bench,

dated 11.11.2008 in I.T.A.No.715/Mds/2007, for the assessment year 1996-97.

2. The assessment in respect of the respondent/assessee for the assessment year 1996-97 was completed under Section 143(3) of the Income Tax Act (Act) on 30.03.1999, on a total income of Rs.26,12,140/-. The assessee owns quarries and is also a dealer in granite. There was a search conducted under Section 132 of the Act, and in which it was revealed that in a real estate dealings, there were "on-money" transactions and cash of Rs.27,00,000/- was seized. The assessee offered to admit the "on-money", but claimed that they will do so on completion of the projects under the 'completed contract method' and therefore, no income was offered by the assessee in the said year, namely, 1996-97. The assessee took a stand that the cash found at the time of search represented "on-money" and the notings and workings made in the slips of paper, were not of relevance, since such notings related to one purchaser. The Assessing Officer found the explanation given by the assessee as not credible. Accordingly, the Assessing Officer based on the evidence included "on-money" component and completed the assessment. Penalty proceedings were also initiated under Section 271(1)(c) of the Act. As against the

quantum assessment, the matter ultimately came before this Court in T.C.(A).Nos.1150 to 1152 of 2006, for the assessment years 1995-96 and 1996-97 respectively and this Court by order dated 03.08.2012, dismissed the appeals filed by the assessee holding that at no point of time, the assessee has taken steps to examine their Accountant nor produce any evidence to substantiate what could be the correct value per sq.ft, if the property was sold to J.P.,Exports. In respect of the penalty proceedings initiated under Section 271(1)(c) of the Act, the Assessing Officer passed a penalty order dated 26.04.2006. Aggrieved by the same, the assessee preferred an appeal to the Commissioner of Income of Tax (Appeals) contending that the Assessing Officer did not record his satisfaction about the concealment while initiating penalty proceedings and unless the said satisfaction is recorded, the penalty is not automatically leviable. In this regard, reliance was placed on decisions of various High Courts. The first Appellate Authority after analysing the contentions raised, held that the seized documents clearly evidenced the fact that the assessee was in the habit of receiving "on-money" in respect of sale of each and every flat at the rate of 50% of the sale consideration. Further, it held that this fact was borne out by various entries in the seized documents. Further, the first Appellate Authority observed that the

entries relating to "on-money" received from J.B.Exports are clearly recorded in the seized documents and there is no escape from inevitable and infallible conclusion that the assessee had received "on-money" of Rs.86,50,250/. Taking note of the findings recorded by the Tribunal in its order in the quantum appeal, the first Appellate Authority held that there is no reason for deviating from the view and there is no infirmity in the imposition of the penalty under Section 271(1)(c) of the Act. Aggrieved by such order, the assessee preferred an appeal to the Tribunal.

3. Before the Tribunal, the assessee contended that there was a mistake in the entries regarding the sale of flats to J.B.Exports and the assessee also filed copies of the entry register in respect of two flats and also in respect of other similar flats, which were sold to other parties. Therefore, it was contended that even J.B.Exports produced the documents before the Assessing Officer, which were examined by the department wherein, it was stated that no "on-money" was paid to the assessee. Therefore, it was contended that the onus is on the department to prove that the non-disclosure of the said income was deliberate and intentional on the part of the assessee.

4. The Revenue resisted the appeal by contending that in view of

the decision of the Hon'ble Supreme Court in the case of ***Union of India vs. Dharmendra Textile Processors*** reported in **[2008] 306 ITR 277 (SC)**, wherein it was held that the penalty provision is a civil liability and willful concealment was not essential. Thus, the Revenue sought to sustain the order passed by the first Appellate Authority. The Tribunal after considering the contention raised on both sides, allowed the appeal. As against which, the present Tax Case (Appeal) has been preferred by the Revenue and admitted on the following substantial question of law:-

Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in cancelling the penalty of Rs.24,25,700/- levied under Section 271 (1)(c) of the Income Tax Act made on the basis of evidence relating to 'on money' receipts on sale of flats found during the search without properly applying the ratio of the Supreme Court in the case of *Union of India vs. Dharmendra Textile Processors* (306 ITR 277).

5. The short question which falls for consideration is whether the order of penalty under Section 271(1)(c) of the Act passed by the Assessing Officer and confirmed by the first Appellate Authority, is just and proper.

6. The case of the Revenue is that the quantum appeal had

attained finality as the assessee's appeals in T.C.(A) Nos.1150 to 1152 of 2006, were dismissed by this Court, by order dated 03.08.2012, that itself would be sufficient to sustain the order of penalty under Section 271(1)(c) of the Act. The learned counsel for the Revenue relied upon the observations made by the first Appellate Authority in its order dated 31.01.2007 and submitted that the Tribunal erroneously reversed the said order.

7. Per contra, the learned counsel appearing for the assessee by relying upon the reasons assigned by the Tribunal sought to sustain the order of the Tribunal.

8. The Tribunal while allowing the assessee's appeal pointed out that onus to prove that there was a concealment of income with a view to avoid the tax, is on the department and penalty is not automatic and merely because the addition is confirmed does not *ipso facto* attract the penalty proceedings. While considering the facts of the case, the Tribunal observed that there is a huge difference in the rate of sale of the flat recorded in other cases and in the case of J.B.Exports and the document that has been relied on in its entirety cannot be considered a part of the document and in the seized

material, 15 entries of sale of flats reveal the rate of flats between Rs.1300/- and Rs.3700/-. Moreover, the rate of flats in 'G' block and very next flat of G8 and G9 has been recorded in the seized material at the rate of Rs.3600/- and Rs.3700/-, whereas the rate of flats G6 and G7 has been recorded at Rs.7500/-. Taking note of these factual details, the Tribunal pointed out that this *prima facie* supports the contention of the assessee that there may be a mistake in recording the rate and there may be a possibility that the rate of two flats are merged and recorded. Considering the facts and circumstances, the Tribunal observed that the possibility of wrong entry cannot be ruled out and the department having failed to prove concealment without any doubt, by relying upon the decision of the Hon'ble Supreme Court in the case of ***Dharmendra Textile Processors***, (supra), allowed the assessee's appeal.

9. Firstly, it is to be stated that the findings recorded by the Tribunal is a finding of fact. Therefore, unless it is shown that such finding is perverse, the same cannot be interfered, while considering an appeal which can be entertained only on a question of law. Further, it has to be pointed out that merely because the assessment proceedings namely, the quantum assessment having been confirmed

by this Court in T.C.(A).Nos.1150 to 1152 of 2006, dated 03.08.2006, cannot automatically lead to the conclusion that the penalty proceedings are justified. Infact, the Tribunal rightly made an observations to the said effect that the quantum assessment cannot have a direct impact automatically leading to inference of concealment and consequent imposition of penalty.

10. The Hon'ble Supreme Court in the case of ***Union of India vs. Rajasthan Spinning and Weaving Mills*** reported in ***(2009) 13 SCC 448***, considered the earlier decision of the Hon'ble Supreme Court in the case of ***Union of India and Ors vs. Dharmendra Textiles Processors & Ors.***, reported in ***[2008] 306 ITR 277 (SC)*** and held that it goes without saying that for applicability of Section 271(1)(c) of the Act, condition stated therein must exist. The above said decision came up for consideration in the case of ***Commissioner of Income Tax vs. Reliance Petroproducts Pvt., Ltd.***, reported in ***[2010] 322 ITR 158 (SC)***. On reading of Section 27(1)(c), the Hon'ble Supreme Court pointed out that in order to bring the case under Section 271(1)(c), 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. In order to



expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision could not be invoked. Thus, the Hon'ble Supreme Court pointed out that a mere making of a claim, which is not sustainable in law, by itself, would not amount to furnishing of inaccurate particulars regarding the income of the assessee. The reading of the decision of the Hon'ble Supreme Court referred to above, thus points out that for sustaining penalty, the bonafide explanation of the assessee must be looked at, so that the contumacious conduct of the assessee for the purpose of sustaining the penalty would be taken as condition that is the main requirement under Section 271(1)(c) of the Act. Referring to the decision in the case of ***Dharmendra Textile Processors***, (supra), the Hon'ble Supreme Court pointed out that in the background of Section 271(1)(c) of the Act, there is no necessity of *mens rea* being shown by the Revenue, however referring to the Explanation to Section 271(1)(c) penalty being a multiple liability, the bonafide of the conduct of the assessee necessarily assumes significant, even though willfulness of the assessee may not be a criteria, the conduct is to be considered. Thus, a mere fact that the addition in this case has been sustained by this Court by itself would not lead to the automatic application to Section 271(1), the Tribunal went into the explanation

offered by the assessee as regards the charging of a higher amount in the case of J.B.Exports. Although, the Tribunal rejected the explanation for the purpose of assessment of goods, it considered it as a good ground for cancellation of penalty, when the explanation on the differential amount was given by the assessee that the entries were made in the account and the Accountant had not made the correct entry.

11. In a recent decision of the Hon'ble Supreme Court in Civil Appeal No.9772 of 2013, dated 30.10.2013 (***Mak Data P. Ltd., vs. Commissioner of Income Tax-II***), the Hon'ble Supreme Court while considering the Explanation to Section 271(1), held that the question would be whether the assessee had offered an explanation for concealment of particulars of income or furnishing inaccurate particulars of income and the Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer between the reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence and when the initial onus placed by the explanation, has been discharged by the assessee, the onus shifts on the Revenue to show that the amount in question constituted their income and not

otherwise. Factually, we find that the onus cast upon the assessee has been discharged by giving a cogent and reliable explanation. Therefore, if the department did not agree with the explanation, then the onus was on the department to prove that there was concealment of particulars of income or furnishing inaccurate particulars of income. In the instant case, such onus which shifted on the department has not been discharged. In the circumstances, we do not find that there is any ground for this Court to substitute our interfere with the finding of the Tribunal on the aspect of the bonafides of the conduct of the assessee.

12. In the circumstances, following the decision of the Hon'ble Supreme Court, we uphold the order of the Tribunal and the Tax Case Appeal stands dismissed. No costs.

**(C.V.,J) (T.S.S.,J)**  
**12.11.2013**

Index :Yes/No  
Internet:Yes/No  
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**CHITRA VENKATARAMAN, J.  
and  
T.S.SIVAGNANAM, J.**

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To

- 1.The Income Tax Appellate Tribunal Chennai 'A' Bench.
- 2.The Commissioner of Income Tax (Appeals) – VI, 121, Mahathma Gandhi Road, Chennai-34.
- 3.The Deputy Commissioner of Income Tax, Circle-I, Chennai-34.

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12.11.2013