

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.11.2009

CORAM

THE HONOURABLE MR. JUSTICE K. RAVIRAJA PANDIAN  
AND  
THE HONOURABLE MR. JUSTICE M.M. SUNDRESH

TAX CASE (APPEAL) NOS.1283 TO 1289 OF 2009  
AND

M.P.NOS. 1 (6 COUNTS) OF 2009  
IN T.C.(A) NOS.1284 TO 1289 OF 2009

Commissioner of Income Tax  
Chennai.

... Appellant/Appellant in all the appeals.

Vs.

M/s. Ample Properties Ltd.,  
(formerly known as Arunodhaya  
Chemicals (P) Ltd.,)  
New No.9/2 (Old No.2)  
Raghvendra Enclave  
Raghvendra Colony  
Virugambakkam  
Chennai - 600 092.

... Respondent/Respondent in all the appeals

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the orders of the Income Tax Appellate Tribunal, Madras 'A' Bench, dated 15.4.2009 in ITA Nos.1364, 1393, 1394, 1395, 1396, 1397 and 1398/Mds/2008 for the Assessment Years 1992-93, 1990-91, 1991-92, 1993-94, 1994-95, 1995-96 and 1996-97 respectively against the order of the Commissioner of Income Tax (Appeals) - VIII, Chennai dated 31.03.2008 and made in ITA.Nos.068, 071 to 073/07-08, 67/07-08, 69 & 70/07-08 for the assessment year 1993-94, 1994-95, 1995-96, 1996-97, 1992-93, 1990-91, 1991-92, against the order of the Assistant Commissioner of Income Tax, Company Circle 1(1), Chennai dated 04.09.2007 in GIR.NO.AX3-208/1996-97, dated 04.09.2007 in GIR.NO.AX3-208/1995-96, dated 04.09.2007 in GIR.NO.AX3-208/1994-95, dated 04.09.2007 in GIR.NO.AX3-208/1991-92, dated 04.09.2007 in GIR.NO.AX3-208/1990-91, dated 19.06.2007 in GIR.NO.AX3-208/1993-94, dated 19.06.2007 in GIR.NO.AX3-208/1992-93.

For Appellant

: Mr. J. Narayanasamy

## COMMON JUDGMENT

(Judgment of the Court was delivered by K. Raviraja Pandian, J.)

These appeals, relating to the assessment years 1992-93, 1990-91, 1991-92, 1993-94, 1994-95, 1995-96 and 1996-97 respectively, have been filed against the common order of the Income Tax Appellate Tribunal, Madras 'A' Bench, dated 15.4.2009 in ITA Nos.1364, 1393, 1394, 1395, 1396, 1397 and 1398/Mds/2008, at the instance of the Revenue, by formulating the following substantial question of law:-

" Whether, on the facts and circumstances of the case, the Tribunal was right in holding that no penalty for concealment is leviable under Section 271(1)(c) if the assessment is based on estimate basis ? "

2. The facts, which are common in all these cases, are as follows:-

The appeal filed against ITA.No.1364/Mds/2008 relating to the assessment year 1992-93 has been taken as typical case of narration of facts. (i) The assessee is engaged in the business of manufacture and sale of solvent ether and anesthetic ether. The assessee filed its return of income for the assessment year 1990-91 on 27.9.1991 declaring a loss of Rs.24,34,390/-. The income was determined at Rs.1,34,74,380/- by the assessment order, dated 30.3.1993.

(ii) The assessee filed an appeal to the Commissioner of Income Tax (Appeals), who remanded the matter to the Assessing Officer. The assessment was redone and the income was determined to Rs.20,90,400/- by the proceedings dated 10.3.1997. The Commissioner once again remanded the matter to the Assessing Officer.

(iii) The order so made by the Commissioner of Income Tax (Appeals) was carried on appeal by the Revenue to the Income Tax Appellate Tribunal, which, by order dated 10.2.2004, set aside the orders of both the authorities and remanded back the issue to the file of the Assessing Officer with a direction to examine the facts once again and decide the issue afresh.

(iv) After the assessment was redone once again, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), who determined the income at Rs.7,87,343/-, which was accepted by the assessee. While the matter in respect of the assessment was resisted, the Assessing Officer initiated penalty proceedings under Section 271

(1)(c) of the Income Tax Act, 1961, by issuing a notice demanding penalty of Rs.4,41,435/- for the assessment year 1990-91 and Rs.2,97,211/- for the assessment year 1991-92. Aggrieved against the levy of penalty, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), who allowed the appeal and directed the Assessing Officer to cancel the penalty against the assessee under Section 271(1)(c) of the Income Tax Act, 1961. Aggrieved by that order, the Revenue filed further appeal before the Income Tax Appellate Tribunal. Thus, the Tribunal relying on the decision of this Court in the case of Commissioner of Income Tax vs. Meenakshi Kutty, reported in (2002) 258 ITR 494, wherein it was held that no penalty for concealment can be levied if the assessment is based on estimate and there is no gross or wilful negligence on the part of the assessee, the Appellate Tribunal upheld the order of the Commissioner of Income Tax (Appeals). The order so made by the Tribunal is canvassed before this Court by filing these appeals.

3. We have heard the argument of Mr.J.Narayasamy, learned standing counsel appearing for the Revenue.

4. For the assessment year 1988-89, the department took the view that the assessee had not manufactured solvent ether, but sold rectified spirit in the black market and earned substantial profit and on this assumption, assessments were completed, determining the income of the assessee by adopting the profit of Rs.5 per Kg. of rectified spirit purchased from the Government of Tamil Nadu, which is the raw material for manufacture of solvent ether. On appeal, the Commissioner of Income Tax (Appeals) confirmed all the assessments in principle, but reduced the income to Rs.1 per litre of rectified spirit. On appeal, the Tribunal set aside the assessment for being redone afresh after examining the Central Excise records and the assessment was completed on 31.3.2006 determining the income by adopting the profit at Rs.1 per litre of rectified spirit purchased from the Government and the said order forms the basis for all the subsequent assessment years. That order has not been carried on by the Revenue by way of appeal. In respect of the assessment years, which are under consideration in these appeals, the assessment orders made by the Assessing Officer were set aside by the Tribunal with a direction to reframe the assessments, after examining the Central Excise records and that the Assessing Officer could not collect the Central Excise records and completed the assessments. On appeal, the Commissioner of Income Tax (Appeals) examined the entire facts of the case relating to earlier years and directed the Assessing Officer to adopt the profit of Rs.1 per litre of the rectified spirit. While doing so, the Tribunal has also taken into consideration the observation made by the Assessing Officer himself in the assessment order in respect of the assessment year 1988-89, which reads as under:-



" Going by the peculiar set of circumstances prevalent in this case and considering that the assessment has gone back and forth to the various authorities without any benefit to the revenue by way of taxes or to the assessee in the form of ending a protracted litigation, it appears to me that in the fitness of things and in the absence of any clinching materials to decide the issue otherwise, I am inclined to accept the appeal made by the assessee and determine the profit on sale of rectified spirit at Rs.1 per litre, taking due note of the decision of the final fact finding authority in the immediately preceding assessment year."

5. The order of the lower authority including that of the Tribunal has given a clear finding that the Assessing Officer was not able to point out any specific evidence on the basis of which the addition was made. On the issue of suppression of sales, it is evident that the Assessing Officer did not bring any material on record to prove that there was suppression of sales. The ultimate addition has been fixed by following the order of the authorities in respect of the assessment year 1988-89, which has become final and no appeal was preferred for that order. In addition to that, the assessee also in order to give a quietus to the litigation requested the Commissioner to complete the assessment as done for the assessment year 1988-89 agreeing for adopting the profit at Rs.1/- per litre. On that basis, the assessment has been made. There is no finding whatsoever that the assessee has suppressed any material or filed inaccurate return for any one of the earlier assessment order under consideration for the purpose of levy of penalty. As already said, the Assessing Officer was not able to fix the exact quantum of suppression and the assessment has been made on concession for the purchase of spirit. In the absence of any finding as to suppression of sales or furnishing inaccurate particulars of such income, invocation of the penal provision under Section 271 of the Income Tax Act, 1961 is not correct. The Assessing Officer has completed the assessment as per the direction of the appellate authority by adopting 1% of profit, which is not based on any material, but on the basis of concession.

6. In respect of analogous factual position of a case, decided by a Division Bench of this Court, in the case of Commissioner of Income Tax vs. K.Meenakshi Kutty, reported in (2002) 258 ITR 494, would be of useful. In the above said decision, it is held that it is not as if the Tribunal has held in all cases, where estimation has been made, the penal provision cannot be invoked, but in the given set of facts, even the estimation was based on any material and on the offer made by the assessee and in the face of the finding relied by the Assessing Officer, there is no clinching materials available to decide the issue. The invocation of penal provision, which

requires concealment and inaccurate particulars is unwarranted in the facts of the present case. Even in Union of India and Others vs. Dharmendra Textiles Processors and Others, reported in (2008) 306 ITR 277, the Supreme Court has observed that the finding as to suppression or inaccurate particulars in the return are necessary for attracting the penal provision under Section 271(1)(c) of the Income Tax Act, 1961. Therefore, we find no illegality or irregularity in the order of the Tribunal, so as to warrant interference by entertaining these appeals. Accordingly, the Tax Case Appeals are dismissed. Consequently, connected miscellaneous petitions are also dismissed.

Sd/  
Asst.Registrar

/true copy/

Sub Asst.Registrar

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TO

1. The Assistant Registrar,  
Income-Tax Appellate Tribunal,  
Rajaji Bhavan, III Floor,  
Besant Nagar, Chennai - 90.
2. The Commissioner of Income - Tax,  
Appeals VIII, Chennai.
3. The Assistant Commissioner of Income Tax,  
Company Circle-1(1), Chennai.

T.C.(A)Nos.1283 to 1289 of 2009

PKB(CO)  
RVL 14.12.2009

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