| Serial No. 1 |
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| Final Hearing |

# HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

ITA No. 04/2016 Date of Order: 31st July 2017

Pr. Commissioner of Income Tax, Jammu.
Vs.
M/s Manzoor Ahmad Walvir

**Coram:**

**Hon'ble Mr. Justice Badar Durrez Ahmed, Chief Justice**

**Hon'ble Mr. Justice Ali Mohammad Magrey, Judge**

**Appearing counsel:**

For appellant(s): Mr. J. A. Kawoosa, Adv.

For respondent(s): Mr. Azhar ul Amin, Adv.

i/ Whether to be reported in Press/Media? Yes/No

ii/ Whether to be reported in Digest/Journal? Yes/No

**Badar Durrez Ahmed, CJ (Oral)**

1. The present appeal is directed against the order dated 20.05.2016 passed by the Income Tax Appellate Tribunal, Amritsar Bench at Amritsar in ITA No. 716(Asr)/2014 pertaining to the assessment year 2009-2010. The present proceedings are penalty proceedings.

2. This Court has already rendered its decision on the quantum proceedings on 27th July 2017 in ITA Nos. 06/2013 and 03/2016. The controversy in the said quantum appeals was with regard to the interpretation sought to be placed on the word "payable" appearing in Section 40(a)(ia) of the Income Tax Act, 1961. The stand of the revenue was that the word "payable" included the word "paid" in the context in which it was used in the said provision. On the other-hand, the assessee was contending

that the word “payable” only referred to amounts which were payable at the end of the year and did not refer to amount which had been paid in the course of the year. We decided that question in favour of the revenue and against the assessee on the basis of the Supreme Court decision in ***M/s Palam Gas Service v. Commissioner of Income Tax: (AIR 2017 SC 2502).*** In that decision, the Supreme Court settled the controversy which has raised in several High Courts with regard to the interpretation to be placed on the word “payable”. The Supreme Court clearly held that the expression “payable” as appearing in Section 40(a)(ia) of the said Act included the amounts already paid.

3. We may also point out at this juncture, as it would be relevant for the purposes of deciding the present appeal in which the question of penalty under Section 271(1)(c) of the said Act is in issue, that in the quantum proceedings, before the Commissioner of Income Tax (Appeals), the respondent/assessee had conceded that the payments made towards the bleaching, dyeing, embroidery, finishing and printing charges fell within Section 194-C of the said Act. The quantum proceedings thereafter were decided on the basis of that concession and admission. However, it is relevant to note that before the Assessing Officer, the assessee had taken the stand that Section 194-C of the said Act, had no application, particularly in view of Circular No. 681 dated 08.03.1994. According to the submissions of the assessee, at the stage of

assessment proceedings, the payments made towards the bleaching, dyeing, embroidery, finishing and printing charges were in the nature of contracts of sale and not in the nature of contracts for work. It was also contended that it was part of the costs of the product of the assessee, namely, Shawls and was so indicated in the return file by the assessee. According to the respondent-assessee, the payments made towards bleaching, dyeing, embroidery, finishing and printing charges were incorporated in the computation of profit and gains from the business and did not fall in the category of deduction under Sections 30 to 38 of the Income Tax Act and, therefore, for this reason also, Section 40(a)(ia) of the Income Tax Act did not at all come into play. This was the view of the assessee at the time of filing of the return and the arguments/ explanation before the Assessing Officer. However, for reasons best known to the assessee, before the Commissioner of Income Tax (Appeals), he conceded that the payments were in the nature of payments falling under the provisions of Section 194-C of the said Act.

4. Coming now to the question framed in the present appeal, we note that by virtue of an order dated 27.01.2017 the following substantial question of law has been framed:-

> Whether in the facts and circumstances of the case and in law, the Hon'ble ITAT is right in deleting the penalty under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961, levied by the Assessing Officer which was not only confirmed but enhanced by the learned Commissioner of Income Tax (Appeals) in appeal?

5. The penalty proceedings which has now reached us by way of this appeal originated in the Assessing Officer's order dated 29.11.2013 whereby we had imposed a penalty of Rs. 63,85,940/- representing 100% of the tax which according to the Assessing Officer was sought to be evaded. We may point out that the Assessing Officer had levied the tax while interpreting Section 40(a)(ia) to refer to only the payments which were payable without including payments which had already been made during the course of the year. Being aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who decided the same on 17.09.2014 by enhancing the penalty amount to Rs. 2,05,43,868/- representing 100% of the tax allegedly sought to be evaded by the assessee. The Commissioner of Income Tax (Appeals) proceeded on the basis that the expression "payable" appearing in Section 40(a)(ia) included not only the amount payable at the end of the year, but also the amount which had been paid in the course of the year and that therefore TDS ought to have been deducted on the entire amount of Rs. 6,04,40,918/-. Since such TDS was not deducted, the entire amount was disallowed in the quantum appeal and consequently 100% on that amount was imposed as penalty i.e., to the extent of Rs. 2,05,43,868/-.

6. Being further aggrieved by the decision of the Commissioner of Income Tax (Appeals) the respondent-assessee preferred an appeal before the tribunal being ITA No. 716(Asr)/2014 which was decided by the impugned order dated

20.05.2016 whereby the Income Tax Appellate Tribunal deleted the entire penalty amount following a decision of the tribunal, Hyderabad Bench in the case of ***ACIT, Circle 3(1), Hyderabad v. Seaways Shipping Ltd. Secundrabad in ITA No. 80(H)/2011*** by order dated 17.06.2011. The revenue, being aggrieved by the decision of the tribunal has filed the present appeal in which the aforesaid question has been framed.

7. Mr. Kawoosa, the learned counsel appearing on behalf of the revenue, submitted that the tribunal had gone wrong inasmuch as the penalty levied by the Commissioner of Income Tax (Appeals) did not suffer from any infirmity particularly in view of the fact that now even this Court has upheld the disallowance of Rs. 6,04,40,918/-in the quantum appeals referred to above in respect of the said assessment year 2009-2010. Mr. Kawoosa, also relied upon the decision of the Division Bench of the Delhi High Court in ***CIT v. Zoom Communication Pvt. Ltd:*** **327 ITR 510 (Del).** In particular, he referred to paragraph Nos. 20 and 21 of that decision. Reliance was also placed on the Supreme Court decision in ***CIT v. Atul Mohan Bindal:*** **(2009) 9 SCC 589** wherein it was indicated that the earlier decision of the Supreme Court in the case of ***Dilip N. Shroff v. CIT:*** **(2007) (6) SCC 329** did not lay down the correct law inasmuch as the difference between 271(1)(c) and Section 276-C of the said Act had been lost sight of. The Supreme Court had noted that in ***Union of India v. Dharamendra Textile Processors:*** **(2008) 13 SCC 369**, a three-Judges Bench of that Court had clearly held that ***Dilip N.***

***Shroff*** (supra) did not lay down the correct law and that the explanation appended to Section 271(1)(c) indicated that there was an element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the returns. Based on these decisions, it was submitted by Mr. Kawoosa that the tribunal had erred in deleting the penalty when, according to him, it was a clear case of concealment of particulars of income and furnishing of inaccurate particulars thereof.

8. Mr. Azhar-ul-Amin, the learned counsel appearing on behalf of the respondent-assessee, however, submitted that the present case has to be examined from two stand points. The first being whether the disallowance under Section 40(a)(ia) *ipso facto* would amount to levy of penalty under Section 271(1)(c) of the said Act. The second being whether the penalty could be levied when the issue itself was debatable. His contention was that in respect of a debatable issue when the assessee takes one point of view in the debate and the same is not accepted by the Assessing Officer, it would not automatically mean that the assessee has been guilty of concealing the particulars of his income or furnishing inaccurate particulars of such income.

9. The learned counsel relied upon the decision of the Supreme Court in the case of ***CIT, Ahmadabad v. Reliance Petro Products Private Limited:*** **(2010) 11 SCC 762.** He also placed reliance on the Delhi High Court decision in the case of ***Shervani Hospitalities Ltd. v. Commissioner of Income Tax:*** **(2013) 261 CTR(Del) 449.**

10. After considering the arguments advanced by the parties, we are of the view that the case before us can be examined in two parts. The first part, which is the easier one, relates to the issue of interpretation of the word “payable” appearing in Section 40(a)(ia) of the said Act to the extent that there has been disallowance by interpreting the word “payable” to include payments made during the year. There can be no doubt that the said disallowance was a debatable issue till the pronouncement by the Supreme Court in ***Palam Gas Service case*** (supra). Some High Courts had taken the view that the expression “payable” did not include the amount paid, while others had taken the view that the expression “payable” included amounts paid during the year. As pointed out above, the Supreme Court finally resolved the controversy in ***Palam Gas Service case*** (supra) by holding that the expression payable included not only the amount which remained payable at the end of the year, but also the amounts paid during the year. Consequently, in our view, when the assessee made the claim, this issue was debatable and, therefore, insofar as the deduction of TDS on amounts paid is concerned, the position is that, while it can be made the subject of disallowance, it cannot form the basis for imposing a penalty. Therefore, on this aspect, the enhancement of the penalty amount by the Commissioner of Income Tax (Appeals) is clearly not justifiable.

11. This leaves us to consider the second part of the controversy with regard to penalty. An argument had been raised

by Mr. Kawoosa that, given the fact that there was a raging debate with regard to the expression “paid” and “payable”, at least for the amounts which were payable, the assessee was liable for penalty. But, here we find that the facts of the present case do not support such a contention. The reason being that the relevant point for consideration insofar as the imposition of a penalty under Section 271(1)(c) is concerned is the point of filing of the return till the assessment is taken up. At that point of time, the respondent-assessee had not conceded that the payments made for bleaching, dyeing, embroidery, finishing and printing charges were covered under Section 194-C of the said Act. In fact the contention of the assessee was that Section 194-C of the said Act was not at all attracted nor was Section 40(a)(ia) of the said Act because no deductions were claimed under Section 30 to 38 of the said Act. The expenditure on the above items was to be covered under Section 28 of the said Act in computing the profits and gains from business. It is also to be seen that insofar as the break-up and quantum of these amounts are concerned, there is no concealment or inaccuracy of particulars. It is a case where a claim has been made by an assessee and that claim has been rejected.

12. The decision of the Supreme Court in ***Reliance Petro Products*** (supra), which had been relied upon by the learned counsel for the respondent-assessee, has clearly examined the meaning of the expressions “concealment of particulars of income” and “furnishing inaccurate particulars of income”. The

said decision also examined the earlier decision of the Supreme Court in ***Dharamendra Textiles Processors*** (supra) and how that decision does not completely overrule ***Dilip N. Shroff's case***, but only to the extent that for sustaining a penalty under Section 271(1)(c) *mens rea* was no longer an essential element. Since the said decision is apposite in the facts and circumstances of the present case, we extract the following passages therefrom:-

> 10. Section 271(1)(c) is as under:-
>
> "271. *Failure to furnish returns, comply with notices, concealment of income etc.* (1) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person----
>
> xxxx xxxx xxxx xxxx
>
> *(c)* has concealed the particulars of his income or furnished inaccurate particulars of such income."
>
> 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 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.

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12. Therefore, it is obvious that it must be shown that the conditions under Section 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.

13. In *Dilip N. Shroff Vs. CIT*, 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 under Section 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.

14. It was further held in *Dilip N. Shroff* 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.

15. It was only on the point of mens rea that the judgment in *Dilip N. Shroff Vs. CIT*, was upset. In *Union of India Vs. Dharamendra Textile Processors* 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, willful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under Section 276-C of the Act. The basic reason why decision in *Dilip N. Shroff Vs. CIT,* was overruled by this Court in *Union of India Vs. Dharamendra Textile Processors* 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 Vs. CIT*.

16. However, it must be pointed out that in *Union of India Vs. Dharamendra Textile Processors*, no fault was found with the reasoning in the decision in *Dilip N. Shroff Vs. CIT*, where the Court explained the meaning of the terms "conceal" and inaccurate". It was only the ultimate inference in *Dilip N. Shroff Vs. CIT* to the effect that mens rea was an essential ingredient for the penalty under Section 271(1)(c) that the decision in *Dilip N. Shroff Vs. CIT* was overruled.

17. 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.

18. 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 under Section 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."

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"20. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature."

13. It is thus obvious that the respondent-assessee having furnished all the details of its expenditure as well as income in its return, it was upto the authorities to accept his claim or to reject it. But merely because the respondent-assess had claimed an expenditure which was not accepted by the revenue, that by itself would not attract the penalty of Section 271(1)(c).

14. We may also refer to the decision of the Delhi High Court in the case of ***Shervani Hospitalities Ltd.*** (supra) and in particular paragraph No. 18 thereof reads as under:-

> "18. We have extensively referred to these judgments, only to show that the issue raised by the assessee was debatable and capable of two views. The assessee had an arguable case or had taken a bonafide plea. The assessee had given his explanation and categorically and clearly stated the true and full facts in the return itself. He did not try to camouflage or cover up the expenses claimed. It is not uncommon and unusual for an assessee to bonafidely claim a particular expenditure as a revenue deduction and expense but not succeed. Every addition or disallowance made does not justify and mandate levy of penalty for concealment under Section 271(1)(c) of the Act. Levy of penalty is not an automatic consequence when an addition is made by disallowing an expense and by not accepting the interpretation given by the assessee. As stated above, the plea and contention raised by the assessee has to be examined before it is decided whether or not the assessee has been able to bring his case within the four corners of the Explanation."

15. The decision of a Division Bench of the High Court of Delhi in ***Zoom Communication*** (supra) is, in the context of the factual matrix of the present case, not applicable in the view that we have taken above. Furthermore, the decision in the case of ***Atul Mohan Bindal*** (supra) relied upon by Mr. Kawoosa, was also considered by the Supreme Court in the later decision in ***Reliance Petro Products*** (supra) and, therefore, since we are applying the decision in ***Reliance Petro Products*** (supra), no further discussion insofar as the earlier decision is concerned is called for.

16. In view of the foregoing discussion, the question framed is answered in the affirmative and against the revenue. As such the

decision of the tribunal in deleting the penalty is upheld, though on different reasoning.

17. The appeal is dismissed.

**(Ali Mohammad Magrey)**
**Judge**

**(Badar Durrez Ahmed)**
**Chief Justice**

**Srinagar**
**31st July 2017**
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