

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "H" NEW DELHI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI C.M. GARG, JUDICIAL MEMBER

ITA Nos. 567, 568 & 569/Del/2006
A.Y.rs. 1981-82, 1982-83 & 1983-84

Dy. Commissioner of Income Tax,
Cir. 15(1), Room No. 412, CR Building,
I.P. Estate, New Delhi

vs. M/s Roger Enterprises (P) Ltd.,
Flat No. L, 1st floor, C-3, Kailash
Colony, New Delhi

(PAN: AAA CR 0234J)

(Appellants)

(Respondents)

Assessee by : Sh. Ajay Vohra, Rohit Jain,
Advocates and Ashwani Seta, CA,
Deepashree Rao, CAs

Department by : Dr. B.R.R. Kumar, Sr. D.R.

ORDER

PER SHAMIM YAHYA : AM

These three appeals are preferred by the Revenue against a common order of Ld. Commissioner of Income Tax (A)-XVIII, New Delhi dated 22.11.2005 whereby he cancelled the penalties of ₹ 18,32,996/-, ₹ 35,00,189/- and ₹ 9,16,213/- imposed by the Assessing Officer u/s. 271(1)(C) for A.Y.rs. 1981-82, 1982-83 & 1983-84 respectively.

2. The relevant facts of the case giving rise to these appeals are as follows. The assessee is a private limited company which filed its return of income for A.Y. 1981-82, 82-83 and 83-84 on 30.6.1981, 30.6.1982 and 10.8.1983 respectively. On the basis of the said

returns, assessments were originally completed by the Assessing Officer u/s. 143(3). The assessments so completed, however, were subsequently reopened for all these three years on the basis of information received by him that the commission claimed to have been paid by the assessee company to three companies, viz., M/s Excavators India Pvt. Ltd., M/s Triveni International Products Pvt. Ltd. and M/s Bahari & Company Pvt. Ltd. in the said years was bogus and the amounts paid to the said companies by cheques towards commission had been actually received back by the assessee company in cash.

3. The statement of Mr. M.K. Meattle, Managing Director of the above three companies was recorded u/s. 131 on 8.3.1990 and in his statement Mr. M.K. Meattle informed the Assessing Officer that commission paid to M/s Roger Enterprises Pvt. Ltd. by the three companies were havala entries. Mr. M.K. Meattle informed that the modus operandi was that Mr. Jhunjhunwala used to fill up the paying slip for depositing the cheques issued by M/s Roger Enterprises Pvt. Ltd. in the name of these three companies and M/s Roger Enterprise had accounts in the same branch of the bank.

3.1 Mr. Jhunjhunwala used to take blank cheques signed by Sh. M.K. Meattle fill up the amounts in his own handwriting and withdraw the cash as the cheques were bearer cheques and the cash withdrawn was returned to M/s Roger Enterprises Pvt. Ltd and Shri Meattle never got 1% commission promised to him. Sh. M.K. Meattle also stated that Shri A.K. Jhunjhunwala used to take his signatures on some papers which were in the nature of correspondence made in the name of three companies. The Assessing Officer further observed that Sh. M.K.

Meattle was asked to appear again on 13.3.1990 at 10 AM for cross examination and a copy of statement of Sh. Meattle was forwarded to the company and to appear on 13.3.90 for cross examining. However, the assessee company filed letter requesting for six weeks time for cross examining Shri Meattle. Hence, the assessee company did not avail the opportunity to cross examine him which established contentions of Sh. Meattle as given in his statement on oath. Assessing Officer further observed that copies of correspondence purported to have been made with these three companies regarding payment of commission to these companies were filed but there was no reasonable basis for payment of these commissions.

3.2 The additions made towards payment of commission to above three companies was confirmed by Ld. Commissioner of Income Tax (A). Assessee filed an appeal before the ITAT on the issue of disallowance of payment of commission to above three parties and the ITAT vide order dated 24.12.93 the assessment were set aside with the directions to afford reasonable opportunity to the assessee to cross examine the persons on whose statements the additions were made. In the set aside proceedings the additions were again confirmed by the Assessing Officer. The additions of this commission was confirmed by the Ld. Commissioner of Income Tax (A). The ITAT vide common order for assessment years 1981-82, 82-83 & 83-84 dismissed the appeal of the assessee, after elaborately discussing the sequence of the events and facts in the body of the order. Subsequent to the above ITAT order penalty proceedings were initiated.

The AO. observed that the issue of cross examining the two witnesses of the case and that no opportunity was provided for cross examining has been rejected by ITAT and the assessee had also categorically refused to cross examine Shri AK. Jhunjhunwala on 27.02.1996 stating that he was stranger to the transaction. The Hon'ble ITAT discussed the entire contents of the statement of Mr. M.K. Meatlle and Shri AK. Jhunjhunwala and held that both the witnesses were witnesses of transaction and were witnesses of fact and rejected the plea of the assessee that Shri Jhunjhunwala was stranger to the transaction. The Hon'ble ITAT held that in the light of provisions of section 33 of the Evidence Act, statement of Shri M.K.Meatlle recorded earlier in the course of assessment proceedings stands as the assessee did not cross examine him despite been provided an opportunity to do so and hence the evidence of Mr. M.K.Meatlle was complete and can be read in and thus the problem lied at the hands of the assessee who had not availed of the opportunity given to it and having not availed of this opportunity was unnecessarily trying to blame the revenue and that the onus of the proof that commission paid was genuine was on the assessee. Merely because payment was made by cheque may persuade the authorities to hold the payment be genuine but in this case the situation is totally reverse as parties to whom the payment made

by cheque alleged to have been made has his own story to tell. The evidences placed by the assessee did not demonstrate the nature of services rendered by the three companies and accordingly the assessee has failed to demonstrate the services rendered and thus failed to discharge the onus and accordingly the ITAT dismissed the appeal of the assessee.

The A.O. further in the penalty proceedings concluded that there is no doubt that the assessee company deliberately not cross examined the witness despite been provided opportunity to do so on one pretext or the other and the Hon'ble ITAT conclusively held that by no stretch of imagination can it be said that the authorities below have not given proper opportunity to the assessee to prove his case and therefore the Assessing Officer after examine all the facts and records took a similar view and do not agree with the assessee that it was not provided an opportunity to cross examine the witnesses.

The Assessing Officer further observed that the assessee had filed Paper Books containing papers claimed to be the correspondence with three companies as evidence of services rendered by these companies and genuineness of the payments. However the role of the three companies in the work does not get substantiated and in the correspondence with the principals of the clients there is no mention

about any role of the three companies who have claimed as sub agent for liaison work and the correspondence has been put in between the clients/principals for justifying the role of payment of 75-80% of the commission received by it. The companies have highly qualified and experienced personnel but the correspondence do not show any evidence and the assessee company ever tried to find out about the genuineness of the claim which proves that the correspondence between M/s. Roger Enterprises Pvt. Ltd. and all the three companies were not genuine.

Thus the Assessing Officer concluded that this corroborates the claim of Shri Meattle that he had signed the papers purportedly claimed as correspondence without actually undertaking any work for the assessee and therefore papers filed by the assessee cannot be relied upon. The AO has stated that the assessee company has given parawise reply claiming the commission was genuine not withstanding the statement given by Shri Meattle and Shri Jhunjhunwala which did not substantiate the same and has not agreed with the contentions of the assessee.

The Assessing Officer confirmed that the assessee vide his letter dated 29.12.2003 has asked for allowing opportunity to cross examine both Shri Meattle and

Shri Jhunjhunwala and the same request was reiterated vide letter dt. 21.01.2004 but such plea at this stage of proceedings appear to be deliberate attempts of the assessee to delay the proceedings. Thus the AO finally concluded that he is of considered view that the assessee has deliberately made a wrong claim of expenditure by way of bogus commission with an intention of concealing the actual income and levied penalty @120% of the tax sought to be d and levied the penalties as under:-

A.Y.	Concealed income	I.Tax surcharge thereon	Min. penalty 100%	Penalty levied at 120%
1981-82	2186042	1527497	1527497	1832996
1982-83	4377973	2916824	2916824	3500190
1983-84	1145983	763511	763511	916213

4. Before the Ld. Commissioner of Income Tax (A) assessee made elaborate submissions. Considering the above Ld. Commissioner of Income Tax (A) observed that nowhere in the assessment order the Assessing Officer has recorded his satisfaction for initiation of penalty proceedings u/s. 271(1)(c). Ld. Commissioner of Income Tax (A) further observed that Assessing Officer has primarily and substantially relied upon the finding of the ITAT and no new facts have been placed on record justifying that the assessee company has concealed the income or furnished inaccurate particulars of income. Ld. Commissioner of Income Tax (A) further observed that on going through the penalty order and replies furnished by the company, it is found that explanation offered by the company was not found to be malafide or false, but the same could not be substantiated on account

of lack of opportunity to cross examine the persons whose ex-party statements have been used for making the disallowance. Ld. Commissioner of Income Tax (A) further observed that in the set aside proceedings Mr. Meattle could not be produced for cross examination and the Assessing Officer himself in the order has admitted that the issue of cross examination of Mr. Meattle has come to dead end. Ld. Commissioner of Income Tax (A) further observed that the addition has been made on the exparte statement of Mr. Meattle and Mr. A.K. Jhunjhunwala recorded by the Assessing Officer in the course of assessment proceedings and / or other proceedings. Ld. Commissioner of Income Tax (A) further observed that as the explanations furnished by the assessee are bonafide and therefore merely because disallowance has been made and confirmed by ITAT no penalty is leviable. Ld. Commissioner of Income Tax (A) further noted that during the course of penalty proceedings assessee company requested the Assessing Officer to cross examine Sh. Meattle and Mr. Jhunjhunwala whose statement was relied upon by the Assessing Officer in disallowing the commission paid by the company. Ld. Commissioner of Income Tax (A) noted that penalty proceedings are separate proceedings and Assessing Officer should have allowed cross examination of both the persons which have been denied due to time baring matter when the set aside order was passed on 25.3.1996. Ld. Commissioner of Income Tax (A) opined that in the interest of justice such opportunity should have been allowed. The whole assessment / reassessment is based upon the statement of two persons mentioned above and no opportunity was allowed in the penalty proceedings to cross examine them. It was further observed that the statement of Mr. Meattle and Mr. A.K. Jhunjhunwala are altogether contradictory and

the answers to the questions put in separately have been answered in a casual way without confirming the entire facts and therefore such statement without cross examination has no meaning in the eyes of law. Ld. Commissioner of Income Tax (A) further observed that in the set aside proceedings, the Assessing Officer could not produce Mr. Meattle for cross examination by the assessee. The notice sent to Mr. Meattle and Mr. A.K. Jhunjhunwala to appear for cross examination has returned unserved. The examination of Mr. Jhunjhunwala on 27.2.1996 denied by the company was not adequate enough because he is not connected with the companies of Mr. Meattle or the assessee company and therefore the assessee company is apparently correct in saying that without cross examination of Mr. Meattle no purpose would have been served by simply cross examining Mr. A.K. Jhunjhunwala. Ld. Commissioner of Income Tax (A) held that the penalty levied without allowing opportunity to the company for cross examination of both the persons are liable to be cancelled. Ld. Commissioner of Income Tax (A) further relied upon the decision of the Delhi High Court in the case of Sona Electric Company vs. C.I.T. 152 ITR 507. The Ld. Commissioner of Income Tax (A) observed that penalty levied on the basis of bald statement rendered behind the back of the assessee and without providing any effective opportunity for cross examination are not legally sustainable. Ld. Commissioner of Income Tax (A) further noted that it is trite law that no addition / adverse inference against the assessee can drawn on the basis of statement of any third party unless an opportunity of cross examination has been granted to him. Ld. Commissioner of Income Tax (A) noted that such a view has also been held in the following cases:-

CBI vs. V.C. Shukla : AIR 2000 SC 426.

Kishan Chadn Chellaram : 125 ITR 713 (SC)

Atul Kumar Jain vs. DCIT : 64 TTJ 786 (Del.)

Pioneer Publicity Corporation vs. DCIT 67 TTJ 471

T.S. Venkatesan vs. Asstt. C.I.T. : 74 ITD 298 (Cal.)

4.1 Ld. Commissioner of Income Tax (A) further observed that he has considered the paper book filed by the assessee wherein the detailed correspondence entered into by the company on day to day basis has been placed on record. Ld. Commissioner of Income Tax (A) further observed that the payment of commission is further supported by the bank statement of the company where the payments have been made by account payee cheques/ drafts and duly admitted of the recipients and the stamped receipts has also been filed alongwith other necessary documents evidencing payment of commission. Therefore, Ld. Commissioner of Income Tax (A) held that explanations of the assessee has been bonafide and the additions made just on the statements of the two persons mentioned above does not amount to concealment or filing of inaccurate particulars of income. In the background of the aforesaid discussion, Ld. Commissioner of Income Tax (A) deleted the levy of penalty for the three years.

5. Against the above order the Ld. Commissioner of Income Tax (A), assessee filed appeal before the ITAT. ITAT considered the case vide order dated 11.12.2006 and held as under:-

“4. At the time of hearing before us, nobody has put in appearance on behalf of the assessee and even the notice of hearing sent by registered post at the address given has come back

undelivered from the postal authorities. These appeals are, therefore, being disposed of ex-parte qua the respondent assessee after hearing the arguments of the Ld. Departmental Representative. It is observed that there was no satisfaction recorded by the Assessing Officer in his assessment orders about the concealment of income by the assessee company or furnishing of inaccurate particulars of such income by it as rightly held by the Ld. Commissioner of Income Tax (A) and even the Ld. Departmental Representative has not been controvert/ rebut this position clearly evident from the said assessment orders.

5. *In the case of Ram Commercial Enterprises (Supra), it was held by the Hon'ble Delhi High Court that a bare breading of provisions of Section 271 and the law laid down by Hon'ble Supreme Court in the case of D.M. Manasvi – 86 ITR 557 makes it clear that the assessing authority has to form its own opinion about the concealment of income by the assessee and also record its satisfaction to this effect before initiating the penalty proceedings. Merely because the penalty proceedings have been initiated, it cannot be assumed that such a satisfaction was arrived at in the absence of the same being spelt out by the order of the*

assessing authority. In the case of C.I.T. vs. Vikas Promoters Pvt. Ltd. – 277 ITR 337, Hon'ble Delhi High Court, while reiterating the similar view, has further held that the provisions of Section 271(1)(c) being penal in nature must be strictly construed and the element of satisfaction should be apparent from the order of the Assessing Officer itself. In both these cases before the Hon'ble Delhi High Court, no such satisfaction, however, was found to be recorded by the Assessing Officer in his order and this being so, the action of the Tribunal in cancelling the penalty imposed u/s. 271(1)(c) was upheld by their Lordships observing that the same was not sustainable in law in the absence of valid initiation. To the similar effect are the other decisions of Hon'ble Delhi High court in the cases of C.I.T. vs. Super Metal Re-rollers – 265 ITR 82, C.I.T. vs. B.R. Sharma – 275 ITR 303 and C.I.T. vs. Auto Lamps Ltd. 278 ITR 32.

6. *As already noted, a perusal of the assessment orders passed by the Assessing Officer for the years under consideration clearly shows that no satisfaction as contemplated by the Hon'ble Delhi High Court in the aforesaid decisions was recorded by the Assessing Officer before initiating the penalty proceedings u/s. 271(1)(c) and this being the undisputed position, we hold*

that the imposition of penalties by the Assessing Officer was not sustainable in law. We, therefore, uphold the impugned order of the Ld. Commissioner of Income Tax (A) cancelling the said penalties imposed by the Assessing Officer u/s. 271(1)(c) on this preliminary issue and dismiss these appeals filed by the Revenue.”

6. Against the above order the Revenue appealed before the Hon’ble High Court of Delhi. In the appeal for assessment year 1982-83 vide order dated 12.9.2008, the Hon’ble High Court has held as under:-

“This appeal pertains to the assessment year 1982-83 and arises out of the Tribunal’s order dated 11.12.2006.

Section 271(1B) has been inserted in the Income Tax Act, 1961 by the Finance Act, 2008 with retrospective effect from 1st April, 1989. The inserted Provision reads as follows:-

(1B) Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings. Under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the

Assessing Officer for initiation of the penalty proceedings under the said clause (c).

In view of the amendment, learned counsel for the parties are agreed that the matters need to be reconsidered by the Tribunal on merits. Under the circumstance, we set aside the impugned order and remand the matter to the Tribunal for reconsideration on merits.

The parties will appear before the Tribunal on 06.10.2008 for Directions. The appeal is disposed of."

7. For the assessment year 1981-82 the Hon'ble High Court has set aside the impugned order of the Tribunal and remanded the matter back to the tribunal for consideration on merits, in view of the retrospective amendment of section 271(1B) as inserted by the Finance Act, 2008 with retrospective effect from 1st April, 1989.

8. For the assessment year 1983-84 also the matter was remanded back to the tribunal by the Delhi High Court vide order dated 28.5.2008. In this case also Hon'ble High Court has noted the insertion of section 271B, the Hon'ble High Court had held that the inserted provision reads as follows:-

“(1B) Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings

under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c)."

9. The Hon'ble High Court further held that in view of the amendment Id. Counsel of the parties agree that the matter needs to be reconsidered by the tribunal on merits. Accordingly, the impugned order of the tribunal was remanded to the tribunal for consideration on merits.

10. Pursuant to the aforesaid remand the appeals were heard by us.

11. We have heard the rival contentions in light of the material produced and precedent relied upon. Ld. Departmental Representative submitted that Ld. Commissioner of Income Tax (A) is totally wrong in observing that no opportunity has been given to the assessee to cross examine the persons whose statements has been relied upon by the Revenue. Ld. Departmental Representative submitted that Assessing Officer's order is sufficient and cogent enough. He further submitted that the quantum appeals have been dismissed by the tribunal. Hence, he pleaded that penalty in this regard should be sustained. In this regard, Ld. Departmental Representative relied upon the following citations:

- ACIT vs. Jasubhai Business Services P Ltd. - 5 SOT 36
- Kamal Chand Jain vs. ITO - 277 ITR 429
- Union of India vs. Dharmendra Textile & Processors - 306 ITR 277
- C.I.T. vs. Somnath Oil Mills - 214 ITR 32

- Western Automobiles (India) vs. C.I.T. - 112 ITR 1048
- C.I.T. vs. Prathi Hardware Store - 203 ITR 641
- C.I.T. vs. United Commercial & Industrial Co. Ltd. - 187 ITR 596
- Sumati Dayal vs. C.I.T. - 214 ITR 801

11.1 Ld. Authorised Representative on the other hand submitted that the Ld. Commissioner of Income Tax (A) has passed a reasonable order. He submitted that proper opportunity to cross examine all the persons on whose statements, addition has been made in this regard has not been allowed to the assessee. He further submitted that the quantum proceedings and penalty proceedings are two separate proceedings. It cannot be said that the penalty is automatic on confirmation of quantum addition. Ld. Counsel further submitted that the appeal has been admitted against the tribunal order in quantum proceedings before the High Court. He submitted that since the matter is admitted by the High Court for hearing. It means that there is a debatable position and hence penalty levied is not sustainable u/s. 271(1)(c). Ld. Counsel of the assessee relied upon the following catena of case laws in this regard:-

- C.I.T. vs. Reliance Petroproducts Pvt. Ltd. : 322 ITR 158 (SC)
- C.I.T. vs. The Basi Sugar Mills Co. Ltd. : I.T.A. No. 232/2005 (Delhi High Court)
- DCIT vs. Saraya Industries Ltd. : 104 TTJ 231 (Del) (Tribunal)
- Sh. Rahul Mehta (I.T.A. No. 14/Del/2010) (Del.) (Tribunal)
- Sh. Puneet Sehgal : (I.T.A. No. 2869 to 2873/Del/2008) (Del. (Tribunal))

- Bhandari Spinning Mills Ltd. vs. I.T.O. (I.T.A. No. 1109/Bang./2007) (Bangalore) (Tribunal).
- C.I.T. vs. Liquid Investments Ltd. : I.T.A. No. 240/2009 (Del. H.C.)
- Rahul Mehta in I.T.A. No. 523/2011 (Del. H.C.)
- Smt. Ramila Ratilal Shah vs. ACIT : 60 TTJ 171 (Ahd.)
- Rupam Mercantile : 91 ITD 237 (Ah.d) (TM)
- DCIT vs. Hero Honda Motors Ltd. : 2698/Del/2010 (Del.)
- ACIT vs. Sh. Vijay Kumar Jindal : I.T.A. No. 4237/Del/2009 (Del.)
- Nayan Builders & Developers P. Ltd. vs. I.T.O. : I.T.A. No. 2379/Mum/2009 (Mum).
- C.I.T. vs. Aretic Investment (P) Limited 190 Taxman 157 (Del. H.C.)
- C.I.T. vs. Rahuljee & Co. : 250 I.T.R. 225 (Del. H.C.)
- National Textiles vs. C.I.T. : 249 ITR 125 (Guj.)
- C.I.T. vs. Kas Movi (P) Ltd. in I.T.A. No. 793 of 2011 order dated 18.11.2011 (Del. H.C.)
- Karan Raghav Exports (P) Ltd. vs. C.I.T. in I.T.A. No. 1152/2011 Order dated 14.3.2012 (Del. H.C.)
- C.I.T. vs. Societex in I.T.A. No. 1190/2011 Order dated 19.7.2012 (Del. H.C.)

12. We have carefully considered the submissions. We find that addition in this case has been primarily made on the basis of statement given by Mr. Meattle and Jhunjhunwala. Ld. Commissioner of Income Tax (A) has held that Assessing Officer has primarily and substantially relied upon the finding of the ITAT and no new facts have been placed on record justifying that the assessee company has concealed the income or furnished inaccurate particulars of income. We agree with the Id. Counsel of the assessee that explanation offered by the company was not found to be malafide or false, but the same could not be substantiated on account of lack of opportunity to cross examine the parties whose whose ex-parte statements have been used for making the disallowance. We find that in the set aside proceedings Mr. Meattle could not be produced for cross examination and the Assessing Officer himself in the order has admitted that the issue of cross examination of Mr. Meattle has come to dead end.

12.1 We further find that during the course of penalty proceedings assessee company requested the Assessing Officer to cross examine Sh. Meattle and Mr. Jhunjhunwala whose statement was relied upon by the Assessing Officer in disallowing the commission paid by the company. In this regard, we agree with the Ld. Commissioner of Income Tax (A)'s observation that penalty proceedings is separate proceedings and Assessing Officer should have allowed cross examination of both the persons which has been denied due to time baring matter when the set aside order was passed on 25.3.1996. Thus, the whole assessment / reassessment is based upon the statement of two persons mentioned above and no opportunity was allowed in the penalty proceedings to cross examine them. Thus, we agree with the observation of the Ld. Commissioner of Income Tax (A)

that penalty levied without allowing opportunity to the company for cross examination of both the persons are liable to be cancelled. We further find that Ld. Commissioner of Income Tax (A) has given a finding that the paper book filed by the assessee contain the detailed correspondence entered into by the company regarding the payment of commission. We further find that payment of commission is supported the bank statement of the company and the payments have been made by the account payee cheques/drafts and duly admitted by the recipients and stamp received have also been filed alongwith necessary documents evidencing of payment of commission.

12.2 Hence, in the background of the aforesaid discussion, we find that assessee company has given documents in support of the commission payments and the payments have been made by account payee cheques also. Revenue has held that penalty is leviable on the basis of two statements given by Sh. Meattle and Mr. Jhunjhunwala. It is apparent that in the penalty proceedings assessee has duly sought opportunity to cross examine those two persons, the same was not provided by the Assessing Officer. Under the circumstances, in our considered opinion, conduct of the assessee is not contumacious enough to warrant the levy of penalty u/s. 271(1)(c).

13. We further find that Id. Counsel's proposition that in cases where cases against the tribunal order has been admitted by the Hon'ble High Court, it is evident that the issue was controversial and existence of two opinions cannot be ruled out. We refer to Hon'ble Jurisdictional High Court decision in the case of C.I.T. vs. Liquid Investments Ltd. in I.T.A. No. 240/2009 Order dated 05.10.2010 supports the case of the assessee. In this case it was held that

against the quantum assessment assessee has preferred an appeal to the High Court u/s. 260A of the Act which has also been admitted and substantial question of law framed. The Court in this regard held that this itself shows that the issue is debatable. For these reasons, accordingly, it was held that no question of law arises in the present case.

14. We further find that Delhi Tribunal in I.T.A. No. 4237/Del/2009 in the case of ACIT vs. Vijay Kumar Jindal had confirmed the deletion of penalty inter alia on the ground that appeal against the ITAT order has been admitted by the Hon'ble High Court and the matter was debatable.

15. We further find that Mumbai Bench of the Tribunal in I.T.A. No. 2379/Mum/2009 in the case of Nayan Builders and Developers P Ltd. vs. ITO vide order dated 18.3.2011 has noted that the tribunal had affirmed in this case the addition in quantum proceedings for which the penalty has been held to be imposable. The Tribunal has held as under:-

“It is, therefore, abundantly clear that the additions in respect of which penalty was confirmed have been accepted by the Hon'ble Bombay High Court leading to substantial question of law. When the High Court admits substantial question of law on an addition, it becomes apparent that the addition is certainly debatable. In such circumstances penalty cannot be levied u/s. 271(1)(c) as has been held in several cases including Rupam Mercantile vs. DCIT [2004] 91 ITD 237 (Ahd) (TM)] and Smt. Ramila Ratilal Shah vs. ACIT

[(1998) 60 TTJ (Ahd) 171]. The admission of substantial question of law by the Hon'ble High court lends credence to the bona fides of the assessee in claiming deduction. Once it turns out that the claim of the assessee could have been considered for deduction as per a person properly instructed in law and is not completely debarred at all, the mere fact of confirmation of disallowance would not per se lead to the imposition of penalty. Since the additions, in respect of which penalty has been upheld in the present proceedings, have been held by the Hon'ble High Court to be involving a substantial question of law, in our considered opinion, the penalty is not exigible under this section. We, therefore, order for the deletion of penalty."

16. Now we examine the present case on the touchstone of the aforesaid decisions. In the present case, we find that Hon'ble High Court in I.T.A. No. 439/2003 vide order dated 27.3.2008 in the quantum proceedings has admitted the assessee's appeal against the order of the tribunal in confirmation of the addition as under:-

"After hearing the Id. Counsel of the parties, we admit this appeal and framed the following substantial question of law for consideration.

- Whether the Income Tax Appellate Tribunal was correct in law in proceedings in the appeal filed by the assessee in the absence of Mr. Meattle having

served or made available for cross examination of the assessee.

- Whether the Income Tax Appellate Tribunal was correct in law in placing reliance of section 33 of the Indian Evidence Act while denying the opportunity to the assessee to cross examine Mr. Meattle.

17. From the above, we find that against the above confirmation by the Tribunal in this case in quantum proceedings the Hon'ble Jurisdictional High Court has admitted the appeal. Thus, we find that on the touch stone of the above aforesaid decision in this case also the penalty is not leviable, as the issue is debtable. In this regard, we also find support from the Hon'ble Apex Court decision in the case of CIT vs. Reliance Petro Products Ltd. in Civil Appeal No. 2463 of 2010. In this case vide order dated 17.3.2010 it has been held that the law laid down in the Dilip Sheroff case 291 ITR 519 (SC) as to the meaning of word 'concealment' and 'inaccurate' continues to be a good law because what was overruled in the Dharmender Textile case was only that part in Dilip Sheroff case where it was held that mensrea was a essential requirement of penalty u/s 271(1)(c). The Hon'ble Apex Court also observed that if the contention of the revenue is accepted then in case of every return where the claim is not accepted by the Assessing Officer for any reason, the assessee will invite the penalty u/s 271(1)(c). This is clearly not the intendment of legislature.

18. We further find that case laws relied upon by the Revenue are not applicable on the facts and circumstances of the case.

- In ACIT vs. Jasubhai Business Services P Ltd. - 5 SOT 36, it was held that when assessee filed inaccurate particulars for claiming deduction and explanation furnished by assessee was not bonafide penalty u/s. 271(1)(c) was leviable.
- In Kamal Chand Jain vs. ITO - 277 ITR 429, it was the case that assessee was not able to offer any satisfactory explanation for certain sum as surrendered by it, in regard to the source.
- In Union of India vs. Dharmendra Textile & Processors - 306 ITR 277, it was held that Section 11AC of the Central Excise Act, 1944 cannot be read to contain mens rea as an essential ingredients and there was no scope for levying penalty below prescribed minimum limit.
- In C.I.T. vs. Somnath Oil Mills - 214 ITR 32, the issue pertained to penalty in the case where based on documents seized by the Sales Tax authorities, assessee was held to have income from undisclosed sources on account of unaccounted purchases.
- In Western Automobiles (India) vs. C.I.T. - 112 ITR 1048, the issue related to penalty pursuant to assessee's agreed addition of amount representing hundi loans.
- In C.I.T. vs. Prathi Hardware Store - 203 ITR 641, the issue related to case where in respect of an item of credit assessee's explanation was considered to be false or

assessee had offered an explanation without any material or evidence to substantiate it.

- In C.I.T. vs. United Commercial & Industrial Co. Ltd. - 187 ITR 596, the issue related to addition u/s. 68 of the I.T. Act.
- In Sumati Dayal vs. C.I.T. - 214 ITR 801, the issue related to addition u/s. 68 considered in the light of human probabilities.

19. In the background of the aforesaid discussions and precedents, we affirm the order of the Ld. Commissioner of Income Tax (A) in this case and confirmed the deletion of penalty.

20. In the result, all the three appeals filed by the Revenue stand dismissed.

Order pronounced in the Open Court on 07/9/2012.

Sd/-
[C.M. GARG]
JUDICIAL MEMBER
Date 07/9/2012
SRBhatnagar
Copy forwarded to: -

Sd/-
[SHAMIM YAHYA]
ACCOUNTANT MEMBER

1. Appellant 2. Respondent 3. CIT 4. CIT (A) 5. DR, ITAT

TRUE COPY

By Order,
Assistant Registrar, ITAT, Delhi Benches*