(2008) 03 KAR CK 0011

In the Karnataka High Court

Case No : IT Appeal No. 179 of 2003

Bhadra Advancing (P) Ltd. APPELLANT

Vs

Assistant Commissioner of Income Tax RESPONDENT

Date of Decision : 11-03-2008

Acts Referred:
Income Tax Act, 1961 — Section 143 (3), 260 A, 271 (1) (c)

Citation : (2008) 219 CTR 447

Hon'ble Judges : Deepak Verma, J;Anand Byrareddy, J

Bench : Division Bench

Advocate : G. Sarangan and H. Vani, for S. Parthasarathi, for the Appellant; M.V. Seshachala, for the Respondent

Judgement

Deepak Verma, J.—Heard Shri G. Sarangan, learned senior Counsel for the appellant and Shri M.V. Seshachala, learned Counsel for the respondent.

2. Challenging the correctness, legality and proprietary of the order passed by the Tribunal, on 14th Feb., 2003 in ITA No. 472/Bang/1998 for the asst. yr. 1994-95, this appeal has been preferred by the assessee u/s 260A of the IT Act, 1961 (hereinafter shall be referred to in short as ''the Act'').

3. Facts shorn of unnecessary details are mentioned hereinbelow:

The appellant assessee is a company, carrying on leasing business by hiring out machinery and equipment to its various customers. It is also into hire-purchase and financing business. It filed its return of income for the asst. yr. 1994-95 declaring a loss of Rs. 5,63,990, which, inter alia, contained a claim of depreciation of Rs. 10,51,050 on two assets, namely a Tata model 320 crane and a Tata-Hitachi Ex-300LC excavator.

According to the assessee, the said machines were purchased by it before 31st March, 1994. Consequently, it had become entitled to claim depreciation on both and accordingly depreciation on both machines was taken in the return filed by it. The said machines were purchased from M/s Tata Engineering & Locomotive

Co. Ltd., Jamshedpur (hereinafter shall be referred to in short as "TELCO") on hire-purchase under a hire-purchase scheme. The order for excavator was placed by the assessee with TELCO on 22nd March, 1994 and the order for crane was placed with TELCO on 3rd/4th March, 1994. The invoices filed by the appellant assessee show that gate pass for excavator was issued by TELCO on 26th March, 1994 and for the crane was issued on 15th March, 1994. According to the assessee these two machines were actually delivered to the lessee/hirers of the assessee on or before 31st March, 1994 and were commissioned by them in the same assessment year. The assessee relied on the aforesaid invoices together with a letter of TELCO dt. 31st March, 1994, whereas excavator was actually commissioned by another lessee/hirer of the assessee at its own site on 30th March, 1994.

During the course of assessment proceedings u/s 143(3) of the Act, the AO sought to verify the assessee''s claim for depreciation and to ascertain if both machines were in fact actually delivered to the lessees/hirers of the assessee before 31st March, 1994 or not, he made enquiries. In this context, as mentioned hereinabove, a letter was addressed to TELCO who had intimated to the AO vide its reply dt. 30th Jan., 1996 mentioning therein that crane was commissioned on 31st March, 1994 and excavator was commissioned on 30th March, 1994 at two different sites by the lessees/hirers of the assessee.

Not being fully satisfied with the aforesaid letter of TELCO, the AO sought to make further enquiry by issue of summons to TELCO. On such further enquiries being made, it was revealed that the trial of crane was performed on 1st April, 1994 and the said machine was finally handed over at the site of the assessee''s hirer on 4th April, 1994. As regards the excavator, the enquiry revealed that the trials were carried out on 29th April, 1994 and the same was handed over to the hirer of the assessee on 30th April, 1994. In this manner, the AO concluded, as a result of the enquiries, that two machines could not have been said to be put to use before 31st March, 1994, thus the assessee was ineligible to claim depreciation on the said machines for that assessment year.

Confronted with this factual aspect, the assessee chose to file a revised return, withdrawing the claim of depreciation for the assessment year. The AO proceeded to frame assessment vide order dt. 29th March, 1996, inter alia, disallowing the assessee''s claim for depreciation on the two machines. The AO further initiated proceedings for levy of penalty u/s 271(1)(c) of the Act for the reason that assessee had concealed income by furnishing inaccurate particulars regarding the claim for depreciation. Thereafter, the AO vide its order dt. 30th Sept., 1996 levied penalty u/s 271(1)(c) of the Act, holding therein that the assessee has committed an offence as envisaged u/s 271(1)(c) of the Act, by virtue of furnishing inaccurate particulars regarding the actual use of the aforesaid two machines, for which depreciation was falsely or wrongly claimed in the return.

Assessee feeling aggrieved by the said order passed by the AO, preferred to file appeal before the CIT(A). The appeal of the assessee was allowed by the appellate Authority, which gave rise to filing of the appeal by the Revenue, against the said order, before the Tribunal. The Tribunal has set aside and quashed the appellate order passed by the CIT(A) and restored the order passed by the AO, thus giving rise to filing of this appeal by the assessee u/s 260A of the Act before us.

4. The appeal has been admitted on the following substantial questions of law:

1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in upholding the levy of penalty u/s 271(1)(c) of the Act?

2. Whether on the facts and in the circumstances of the case, the claim for depreciation, when the machinery was purchased and set in motion to the work site of the lessee with whom a lease agreement has been executed by the appellant in the course of its leasing business, was a wrong claim to justify the levy of penalty u/s 271(1)(c) of the Act when it was found that the machines did not reach the work site of the lessee and were commissioned before the end of the accounting year?

5. We have accordingly heard the learned Counsel for the parties at length and perused the records.

6. Section 271(1)(c) has undergone several amendments since 1964 onwards. However, the provision, which is relevant for the purpose of this case, namely asst. yr. 1994-95 reads as under:

271. Failure to furnish returns, comply with notices, concealment of income, etc.- (1) If the AO or the CIT(A) or the CIT in the course of any proceedings under this Act, is satisfied that any person-

(a) (omitted)

(b) ....

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,-

(i) (omitted)

(ii) ....

(iii) in the cases referred to in Clause (c), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

Explanation J.- Where in respect of any facts material to the computation of the total income of any person under this Act,-

(A) Such person fails to offer an explanation or offers an explanation which is found by the AO or the CIT(A) or the CIT to be false, or

(B) Such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.

Even though it has further Explanations appended to this section, but since those are not required for the purposes of this case, the same have not been reproduced by us.

7. It is also pertinent to mention here that assessee had taken these two machines on hire-purchase agreements having been entered into between the assessee and M/s Cholamandalam Investment & Finance Co. Ltd. for crane. Thus, the price of these two machines was actually paid by the financiers of the assessee company to M/s TELCO. In the invoices issued by TELCO, the assessee has been described as hirer in the same.

8. It is further pertinent to point out here that there is no dispute by the Revenue that for the purpose of taxation, the assessee has been treated as owner of these machines.

9. Before we proceed to decide the aforesaid questions of law, certain more facts and dates are required to be reiterated. Assessee had admittedly placed orders for the two machines, namely, crane and excavator with TELCO on 3rd/4th March, 1994 and 22nd March, 1994, respectively. As is evident from the invoices issued by the TELCO, gate pass for crane was issued on 15th March, 1994 and the gate pass for excavator was issued on 22nd March, 1994. The crane was to be supplied at Lalithpur, U.P., to the hirer of the assessee, whereas excavator was to be supplied to another hirer of the assessee at Hungund, Bijapur. Consequent thereupon, the assessee had entered into two agreements dt. 19th March, 1994 and 29th March, 1994 with M/s Gem Granites, Bangalore, for supply of excavator to it and on 19th March, 1994 with M/s Mount Victoria Granites for supply of crane to it. For convenience they have been referred to as lessees/hirers of the assessee. Coupled with this factual scenario, it is also to be noted that TELCO had also vide its letter dt. 30th Jan., 1996 informed the Revenue, pursuant to the query made by the AO, that crane was commissioned at site of the hirer of the assessee on 31st March, 1994, whereas the excavator was commissioned at another site of the hirer of the assessee on 30th March, 1994. On account of aforesaid facts, as mentioned hereinabove, the assessee was under a bona fide belief that it had become entitled to claim depreciation on the aforesaid two machines in the asst. yr. 1994-95. It accordingly proceeded to file its return

showing loss, which contained claim of depreciation on these two machines. However, later on, it withdrew claim of depreciation and filed fresh return. Obviously, it claimed depreciation on the aforesaid machines in the next assessment year.

9. Learned Counsel for the appellant contended that the Tribunal committed an error in coming to the conclusion that the claim of depreciation was wrongly made by the assessee. Therefore, the provisions of Section 271(1)(c) of the Act were attracted. It was further contended that the facts would reveal that for all practical purposes, the appellant had become owner of machines prior to 31st March, 1994 and consequently it had also become entitled to claim depreciation. It was only on enquiries made later, it was revealed that the machines were put to operation subsequent to 31st March, 1994. Therefore, it proceeded to withdraw the claim for depreciation in that assessment year and filed fresh return. Even though, according to the appellant the machines were actually put to use before 31st March, 1994, but under some erroneous impression it had withdrawn the claim for depreciation for that assessment year and preferred to claim the same in the next assessment year and thereby filed fresh return. It was therefore contended that in the facts and features of the case, the bona fides of the claim of the assessee for depreciation could not be doubted and in any case the assessee had not exposed itself for law of penalty as contemplated u/s 271(1)(c) of the Act.

10. Learned Counsel for the appellant has cited various authorities. However, it is not necessary to deal with all the authorities, which have been cited before us. But reference to some of them is appropriate.

(a) Commissioner of Income Tax, Karnataka, Bangalore Vs. M/s. Shaan Finance (P) Ltd., Bangalore,

The question that arose for consideration in the above case was an assessee''s entitlement to investment allowance u/s 32A of the IT Act, 1961. The assessee was a financial company which purchased machinery and hired out the same to manufacturers, under agreements of hire. The Court observed, while addressing the case law, that when machinery is given on hire by the owner to the hirer on payment of hire charges, the owner is also entitled to depreciation on the machinery so hired out. That a transaction of hire is one of bailment of the machinery. There is no extinguishment of any right of the owner in the machinery. There is merely a licence given to the hirer to use for a temporary period, the machinery so hired. Unlike a hire-purchase agreement, where two elements are involved, namely, the element of bailment and the element of sale, in the sense that it contemplates an eventual sale, it was held that the given case on hand being one of a contract of hire simpliciter and therefore, lacking any element of sale, the agreement could not be treated as a ''transfer'' to disallow the grant of investment allowance.

Reliance is also placed on:

Commissioner of Income Tax Vs. Aswati Corporation, ;

CIT v. Maharashtra Apex Corporation Ltd., (2002) 254 ITR 98 (SC) , and

Commissioner of Income Tax Vs. Pinnacle Finance Ltd., ,

all of which were decisions rendered following the ratio laid down in Shaan Finance (P) Ltd. (supra).

(b) Multican Builders Ltd. Vs. Commissioner of Income Tax, .

It has been held in that case that two conditions have to be fulfilled for claiming allowance of depreciation (i) that the plant and machinery must be owned by the assessee; (ii) it must be used for the purpose of business of the assessee. While dealing with the depreciation in respect of vehicles, which were leased out where depreciation could be claimed, it has been held as under:

9 The leasing of the article or thing would amount to employment of the article or thing for profitable use, since the advantage of the possession or acquisition of the article or thing is being obtained by reason of such leasing. Whether the rent is payable at a later date or the profit that will accrue at a later point of time would not be relevant for the purpose of determining the use of the article or thing. In a business of leasing the moment the article or thing is leased out, the article or thing is put to use for the purpose of leasing or is used for leasing, the business. The rent or profit, which will accrue, will accrue on account of grant of lease from the date when the lease is granted, even though the profit or the rent may accrue at a later point of time.

(c) Commissioner of Income Tax Vs. Reetu Finlease (P) Ltd.,

In this case, the assessee who was engaged in the business of leasing equipment claimed depreciation on certain machinery which was purchased by it in the previous year. The AO enquired into the genuineness of the purchase transaction and it was found that the assessee had failed to establish the purchase and the claim for depreciation was rejected. On appeal to the CIT(A), the finding was set aside. It was held by the appellant Authority that the purchase was established and that the machines had in fact been leased to another and installed in their manufacturing unit. In a further appeal by the Revenue, the Tribunal, while affirming the view of the appellate Authority, following the decisions of the High Court of Delhi and the High Court of Kerala, held that since the assessee was engaged in the business of leasing, the machines must be deemed to have been used for its business no sooner the same were leased to the lessee. The Delhi High Court affirmed the view of the Tribunal and has held that once the machines are shown to have been handed over to the lessee, the same must be deemed to have been utilised for the business of the assessee, especially when the assessee is engaged in a leasing business.

(d) Commissioner of Income Tax Vs. Raj Kumar Singh and Co.,

In this case, the assessee was the owner of certain dumpers and tippers which it gave out on hire to contractors on a daily basis. The claim of the assessee for depreciation and repairs on the said tippers and dumpers, when the same had not been put to actual use and were only kept as a standby was one of the questions that was in dispute. Answering the said question, the Court held that the assessee was required to provide the tippers as a standby so that in the event of any major breakdown or otherwise, if the vehicles on hire were not capable of being used, these could have been used. The depreciation and repairs were held admissible on such vehicles which were provided as a standby.

Relying on the above line of cases, the senior advocate would emphasize that having regard to the business of the assessee, which is primarily that of leasing of machinery, it could safely be said that when the machinery in question is delivered to its hirer, the same is put to use in the assessee''s business. The actual user of the machinery is secondary for purposes of a claim for depreciation.

11. Nextly, reliance is placed on a large number of decisions to support the contention that in order to justify the levy of penalty, the circumstances must show that the assessee had an intention to conceal the income and to evade the payment of tax. An extensive reference is made to the case decided by the Supreme Court in Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another, . In the said case, the appellant before the Supreme Court was an HUF. For a particular assessment year, the income was declared, inter alia, showing a long-term capital loss. The capital loss was said to have arisen on account of sale of property, being land and building. The appellant claimed to have a 1/4th share therein. An agreement of sale was entered into in respect of the said undivided share for a particular sum of money. For purposes of valuation, a registered valuer was appointed. The value was determined as per valuation report for purposes of computation of capital gains. The return filed was scrutinised by the concerned Authority and in exercise of powers u/s 55A of the IT Act, 1961, referred the matter for valuation to the DVO who in turn, submitted his report. On the basis of the said report, which was adopted, long-term capital gain was determined. In view of the order of assessment, a show-cause notice was issued u/s 274 r/w Section 271 of the Act. As there was a difference between the value as determined by the registered valuer and the DVO and negating the reply of the appellant, penalty was imposed, which was unsuccessfully challenged before the CIT(A) and the Tribunal and the appellant was before the Supreme Court.

12. On an extensive reference to the decided case law, the Supreme Court has opined as follows:

Thus, it appears that there is a distinct line of authorities which clearly lay down that in considering a question of penalty, mens rea is not a relevant consideration. Even assuming that when the statute says that one is liable for penalty if one furnishes inaccurate particulars, it may or may not by itself be held to be enough if the particulars furnished are found to be inaccurate is anything more needed but the question would still be as to whether reliance placed on some valuation Of an approved valuer and, therefore, the furnishing of inaccurate particulars was not deliberate, meaning thereby that an element of mens rea is needed before penalty can be imposed, would have received; serious consideration in the light of a large number of decisions of this Court.

And on facts, concluded that the question would be whether it was a fit case where discretionary jurisdiction was properly exercised or not. Further, that imposition of penalty is not automatic and that levy of penalty is not only discretionary in nature but such discretion is required to be exercised on the part of the AO keeping the relevant factors in mind. Some of those factors would inhere on the face of the statutory provisions and the factors which are material would be primarily relatable to:

(a) failure to offer an explanation or offering an explanation which is false; and

(b) which he is not able to substantiate and fails to prove that such explanation is bona fide.

Placing reliance on the case of D.M. Manasvi Vs. Commissioner of Income Tax, Gujarat, II Ahmedabad, , it was held that the primary burden of proof, therefore, is on the Revenue. The statute requires a satisfaction on the part of the AO. He is required to arrive at a satisfaction so as to show that there is primary evidence to establish that the assessee had concealed the amount or furnished inaccurate particulars and this onus is to be discharged by the Department. Once the primary burden of proof is discharged, the secondary burden of proof would shift on the assessee because the proceeding u/s 271(1)(c) is of a penal nature, in the sense that, its consequences are intended to be an effective deterrent which will put a stop to practices which Parliament considers to be against the public interest and, therefore, it was for the Department to establish that the assessee was guilty of furnishing inaccurate particulars of income.

13. Reliance is also placed on Sri T. Ashok Pai Vs. Commissioner of Income Tax, Bangalore, , which is rendered subsequent to Dilip N. Shroff (supra) by the very same Bench of the Supreme Court wherein, insofar as inaccurate particulars are concerned, it is held that if an explanation given by the assessee with regard to a mistake committed by him has been treated to be bona fide and it is found as a fact that he had acted on the basis of wrong legal advice, the question of his failure to discharge the burden would not arise.

14. However, Shri Sarangan would also draw attention to the case of Union of India v. Dharamendra Textile Processors (2007) 212 CTR (SC) 432 : (2007) 295 ITR 244 , wherein the question whether the intention of imposing mandatory penalty on persons who evade payment of tax should be read to contain mens rea as an essential requirement, was referred to a larger Bench of the Supreme Court, in view of the conflict of opinion in the judgments of the Division Bench of the Supreme Court in The Chairman, SEBI Vs. Shriram Mutual Fund and Another, . But, however, he would submit that on the facts and circumstances of the present case on hand, it cannot be said that the assessee was not entitled to

claim depreciation and therefore, initiation of penalty proceedings was not warranted and would conclude that the questions of law be answered in favour of the assessee and against the Revenue.

15. Per contra, Shri M.V. Seshachala, learned Counsel appearing for the Revenue, submitted that the records would show that in any case assessee had not become the owner of the machines prior to 31st March, 1994 as the same were commissioned much thereafter. It was further contended that unless the machines were actually put to use and until the assessee starts getting revenue from the said machines, it would not be entitled to claim depreciation on the same. He further contended that the aforesaid legal position cannot be doubted, which is clearly borne out from reading of Section 32 of the Act, which deals with depreciation. Reliance placed on the following authorities:

(a) Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi, .

In this case, the assessee, a limited company, derived its income from the manufacture and sale of sugar and confectionery. The ITO, in the assessment, made certain additions besides others. The assessee did not challenge the assessment order in regard to the additions made. It was the assessee''s case that though the additions were totally illegal and not justified, the assessee did not challenge the same, since it wanted to maintain good relations with the Revenue. The ITO having issued a notice u/s 274 r/w Section 271 of the IT Act, 1961 the assessee company demurred. The Authority imposed a penalty u/s 274 holding that there was concealment of income. An appeal was preferred against the order. The Tribunal reduced the penalty. One of the questions that was considered in a reference before the High Court was, whether the finding of the Tribunal that the assessee had not concealed income was correct in law and the High Court having answered the question and the same having been carried in appeal before the Supreme Court, the Supreme Court held that the High Court can only lay down the law applicable to the facts found by the Tribunal. In the instant case on hand before the Supreme Court, it was noticed that the Tribunal had not acted on material which was irrelevant or considered material which was partly irrelevant or based its decision partly on conjecture, surmises or suspicion and therefore, the High Court was wrong in interfering with the order of the Tribunal.

(b) M/s. K.P. Madhusudhanan Vs. Commissioner of Income Tax, Cochin,

The assessee in this case had purchased rice from suppliers in Andhra Pradesh. The rice was sometimes sent directly and payment, therefore, was made by demand draft or telegraphic transfer. During the course of the assessment proceedings, the AO noticed that a demand draft and a telegraphic transfer were not entered by the assessee in its cash book on the dates on which the same were purchased and made, respectively. When these were pointed out to the assessee, the assessee submitted a letter stating that, as sufficient cash balance was not available to it on the dates of the transaction, it had obtained loans from friends as it expected to repay such loans within a short time, and therefore, no entries were made in the books of account in respect thereof and it also stated that since it was unable to furnish evidence for such loans, it offered the amount as additional income. The assessment was accordingly made treating the sum as unexplained investment. Penalty proceedings were then initiated against the assessee. The AO found assessee''s explanation in regard to the loans to be unacceptable. Applying Expln. 1(B) to Section 271(1)(c), the AO imposed a penalty. The appeal filed by the assessee was dismissed. In a further appeal, the Tribunal allowed the same. The questions arising thereof were placed for consideration before the High Court. The High Court having answered the question in favour of the Revenue, the assessee was in appeal before the Supreme Court. The Supreme Court held that the virtue of notice u/s 271, the assessee is put to notice that if he does not prove in the circumstances stated in the explanation that his failure to write his correct income was not due to fraud of neglect, he shall be deemed to have concealed particulars of his income or furnished inaccurate particulars thereof and consequently, be liable to penalty provided by that section and disagreed with the view taken by the Bombay High Court in the case of Commissioner of Income Tax Vs. P.M. Shah,

(c) Chairman, SEBI v. Shriram Mutual Fund and Anr. (supra)

The respondent in the said case was a mutual fund and asset management company. The respondent has conducted business through associated brokers in excess of the limits prescribed under the SEBI (Mutual Funds) Regulations, 1996. The respondent had failed to comply with the terms and conditions attached in the certificate of registration. Consequently, the SEBI had enquired into the contraventions and confirmed the charges while imposing a penalty. One of the questions that arose for consideration by the Supreme Court in the proceedings that followed was, whether mens rea was an essential element for imposing penalty for breach of civil obligations. After considering several decisions wherein it was held that mens rea is not an essential element for imposing penalty for breach of civil obligations namely in, the case of:

Director of Enforcement Vs. M/s. MCTM. Corporation Pvt. Ltd. and others, ;

J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, ;

R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, ;

Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam, ;

Swedish Match AB and Another Vs. Securities and Exchange Board, India and Another, ;

SEBI v. Cabot International Capital Corporation (2005) 123 Comp. Cas 841 sc.

It was held that penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the regulations is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must be made by the defaulter with guilty intention or not unless the language of the statute indicates the need to establish the presence of mens rea; it is wholly unnecessary to ascertain whether such a violation was intentional or not.

(d) The Deputy Commissioner of Income Tax, Special Range-4 Vs. Yellamma Dasappa Hospital,

The question that arose was whether the assessee was entitled to the benefit the depreciation in terms of Section 32 of the Act. The AO found that the firm did not produce any evidence in respect of the claim for depreciation. In appeal, it was noticed by the appellate Authority that the machinery was kept ready for use but, could not used and that therefore, the appellant was entitled for depreciation. The same having been challenged before the Tribunal, the same was partly allowed. This Court by its judgment held that the machinery being kept ready for use, would not enable the assessee to claim depreciation and if the machinery is not used, Section 32 would not be applicable and hence the assessee cannot have benefit under the said section.

(e) The Commissioner of Income Tax Vs. Sree Valliappa Textiles, , wherein the Revenue had questioned the order of the Tribunal setting aside the levy of penalty for concealment of income on the cost of purchase of machinery. It was held by this Court that the assessee had chosen to claim the benefit with regard to the machinery on the ground of putting the machinery to use before a particular date whereas the machinery was not even despatched from the seller''s factory premises'' as on that date and on that basis, false information was provided by the assessee. The assessing Authority, after noticing the conduct had given a detailed finding with regard to the matter in. question. The Tribunal however, had failed to take the same into account while setting aside the order of penalty and therefore the order of penalty was held to be in order.

16. Therefore, Shri Seshachala submits that in the present case on hand, admittedly, the assessee having claimed depreciation while falsely asserting that the machines had been put to use and upon verification, when the assessee was confronted with the actual fact situation, the assessee having chosen to withdraw the claim for depreciation could only lead to the presumption of false particulars having been furnished in the first instance and therefore, the assessee would be visited with penalty. The requirement of mens rea being established, does not arise for, if the Revenue had not probed into the issue, the assessee would have persisted with its claim for depreciation and therefore, the Counsel would submit that the questions arising in the appeal be answered in favour of the Revenue.

17. By way of reply, Shri Sarangan would point out that even if it were to be accepted that mens rea was not an element which required consideration for initiating penalty proceedings, the assertion of the Revenue that in order to claim depreciation, .the machinery ought to have been put to use, cannot be held against the assessee. It is not in dispute that the machinery has been leased to third party, who in fact, put it to actual use. Insofar as the assessee is concerned, the machinery is put to use in the course of its business and that satisfies the condition for claiming depreciation. Hence, the claim for depreciation was neither illegal nor can it be said that it was based on incorrect particulars. The withdrawal of the claim was on a mute acceptance of the impression given by the Revenue that the assessee was not entitled to claim depreciation unless the machinery was actually used. Hence, the subsequent withdrawal did not result in any infraction either by way of concealment of income or on account of having furnished false particulars. In this regard, he would point out that several cases cited at the Bar would have to be addressed in relation to the facts and circumstances of the given cases and the line of cases dealing with lease of machinery in the course of business, being considered as use of that machinery and which would be applicable to the assessee ought to be taken note of.

18. In the light of the above contentions and a perusal of the record would further show that in this case also there was nothing to hold about the non-genuineness of the documents on which reliance has been placed by the assessee, nor the documents on which reliance has been placed by the assessee can be said to be sham or bogus. The finding has also not been recorded by the Tribunal in the regard. Thus, we proceed on the assumption with regard to the correctness and genuineness of the documents.

19. Looking to the nature of business which the appellant has been Varying on, the actual user of the machines may not be necessary to be considered in this particular case. The actual user of the machines was by the hirers of the assessee who were handed over the respective machines at their work site for and on behalf of the assessee by TELCO directly. Obviously, it was for the hirer who have used the machinery looking to its own requirement and the job of work that it was doing. But, that alone would not be sufficient to deprive the assessee from claiming depreciation on the said machines.

20. As per the agreement entered into by the assessee with its hirers on 15th March, 1994 and 29th March, 1994, the machines were actually handed over to the hirers at their respective sites. Thus, the assessee was not responsible or answerable as to from what dates they were put to actual use by them. Thus, it will be equally true that non-user of the machines by the hirers of the assessee would not deprive the assessee from claiming depreciation on the said machines as it had fulfilled the two requirements for claiming depreciation, namely it had become the owner of the machines and the same were in turn leased out to different hirers before 31st March, 1994.

21. In fact, there was no need on the part of the assessee to have withdrawn its

claim for depreciation for the particular assessment year. It appears that due to some ill advice given to the assessee, it proceeded to withdraw the same and claimed it in the next assessment year. However, this only establishes the bona fides Of the assessee and the same cannot be doubted by us.

In any case, it has not been disputed by the Revenue that assessee had become entitled to claim depreciation on the said machines in the next assessment year. This would further go to show that assessee had acted bona fide and the same could not have been doubted at all. The reasons assigned by CIT(A) appear to be well founded and are based on correct legal proposition. The same could not have been reversed or upset by the Tribunal.

22. Even if doctrine of mens rea is to be applied to the facts of this case, then after having gone through the facts of the case, we are of the considered opinion that conduct, behaviour and attitude of the assessee would show that mens rea is altogether missing. Then obviously assessee would not have exposed itself for levy of penalty as contemplated u/s 271(1)(c) of the Act. That being the position, we answer the questions of law in favour of the assessee and against the Revenue. Consequently, the order of the Tribunal is hereby set aside and quashed and the order of the CIT(A) is restored.

23. Accordingly, the appeal would stand disposed of.