
(2015) 07 CAL CK 0004
In the Calcutta High Court
Case No : ITA 176 of 2009 and 678 of 2008

C.I.T, Central-II

APPELLANT

Vs

Balarampur Chini Mills Ltd.

RESPONDENT

Date of Decision : 02-07-2015

Acts Referred:

Evidence Act, 1872 — Section 114

Income Tax Act, 1961 — Section 115JB, 131, 132, 133A, 139

Citation : (2015) 3 CALLT 295 : (2015) 280 CTR 363 : (2015) 376 ITR 1

Hon'ble Judges : G.C. Gupta, J;Arindam Sinha, J

Bench : Division Bench

Advocate : Nizamuddin, for the Appellant; S.K. Kapoor, J.P. Khaitan, Senior Advocates and Sanjoy Bhowmick, Advocates for the Respondent

Judgement

G.C. Gupta, J.—The subject matter of challenge in the appeal is a judgment and order dated 18th January, 2008 pertaining to the Assessment Year 2003-04 and Assessment Year 2004-05 by which the learned Tribunal agreeing with the CIT (Appeals) dismissed the appeal preferred by Revenue. Aggrieved by the order revenue has come up in appeal. The following question of law was formulated at the time of admission of the appeal registered as ITA 678 of 2008:-

"Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in confirming the Commissioner of Income Tax (Appeals) order deleting the penalty of Rs. 22,95,000/- levied by the Assessing Officer under Section 271(1)(c) of the Income Tax Act, 1961 in relation to the Assessment Year 2004-05?"

2. The facts and circumstances of the case briefly stated are as follows:-

3. The assessment order dated 19th May, 2006 in so far as the same is material for our purpose reads as follows:-

"In the case the assessment u/s. 143(3) of the I.T. Act was completed on 28.12.2005 to a total income of Rs. 5,91,48,819/- and tax was charged u/s.

115JB of the I.T. Act. On 3rd April 2006 the assessee filed a revised return showing a total income of Rs. 9,63,48,819/- under Normal Provisions of the Act. However Book-Profit was shown at Rs. 65,49,20,882/- u/s. 115JB of the Act. On scrutiny of the said return it was observed that assessee had disclosed additional amount of Rs. 3,40,00,000/-. The assessment was, thus, reopened u/s. 147 and notice u/s. 148 was issued on 18.04.06 and served on the assessee. The assessee replied on 22nd April, 2006 to consider the return filed on 03.04.2006 as return filed u/s. 148.

A notice u/s. 143(2) was issued and served on 10.05.06.

In response, Mr. Ravi Tulsyan, A/R of the assessee appeared on 15.05.06. The case was heard and discussed.

It appeared that in the previous year relating to the assessment year the assessee had made payments of Rs. 3,40,00,000/- to U.P. Distillers Association. A Search was conducted u/s. 132 of the Act, in the office of the U.P. Distillers Association by the Directorate of Income Tax (Investigation) New Delhi. From the seized record the payment of Rs. 3,40,00,000/- was found, made by the assessee. It was submitted by the A/R that to avoid protracted litigation and to put a quietus to the whole issue the assessee had offered this amount as disallowable item u/s. 37(1) of the Act, through the return dated 3rd April 2006.

Since the amount was offered as income by the assessee this amount is added back in computation of Income, in addition to the assessments made u/s. 143(3) dated 28.12.2005.

The computation of income is made below:-

Since the assessee offered the additional income due to the search operation u/s. 132 of the Act in the premises of U.P. Distillers Association, penalty proceedings u/s. 271(1)(c) is initiated separately."

4. The assessment order dated 30th March, 2007 levying penalty in so far as the same is material for our purpose reads as follows:-

"In the case, assessment U/s. 143(3) of the Income Tax Act, 1961 was completed on 28.12.2005. Subsequently, on 3rd April, 2006, the assessee filed a return stated to be revised return along with a letter, the assessee disclosed a sum of Rs. 3,00,00,000/- being alleged payment by the assessee to U.P. Distiller's Association during the previous year relevant to the assessment year and stated that this amount is not allowable by virtue of explanation to Section 37(1) of the Income Tax Act, 1961.

Since, the assessment U/s. 143(3) of the Income Tax Act, 1961 was completed this return is treated as invalid return. But since the assessee disclosed additional amount of Rs. 3,00,00,000/- as income which required verification in the context of the original return, the case was re-opened U/s. 147 of the Income Tax Act, 1961 and notice U/s. 148 was issued.

The re-assessment proceedings U/s. 147/143(3) of the I.T. Act, 61 were completed on 19.05.2006. It was observed that a search was conducted U/s. 132 of the Act, in the office of the U.P. Distillers' Association by the directorate of Income Tax (Investigation), New Delhi and in the seized record a payment of Rs. 3,00,00,000/- was found to be made by the assessee to the U.P. Distillers' Association.

On the basis of the above detection the assessee offered income by way of disallowance of expenditure under explanation to Section 37(1) of the Act. The assessee in its submission stated that to avoid protracted litigation and to put a quietus to the whole issue the assessee had offered this amount as disallowable item U/s. 37(1) of the Act.

The tax was charged in the assessment U/s. 143(3), U/s. 115JB of the Act. In the so called revised return the assessee increased the Book Profit by the amount of Rs. 3,00,00,000/-.

Notice U/s. 271(1)(c) was issued on 19.05.2006 and this notice was duly served on the assessee. The assessee filed reply on 1st June, 2006.

The assessee submitted that the so called revised return filed by the assessee on his own volition and no concealment was detected in course of assessment proceedings, and mere acceptance by the assessee of certain amount as his taxable income cannot mean that he deliberately concealed any part of the income.

The assessee further submitted that the case of the assessee was covered by the decision in the case of Commissioner of Income Tax Vs. Suresh Chandra Mittal, (2001) 170 CTR 182 : (2001) 251 ITR 9 : (2003) 11 SCC 729 .

The submission of the assessee is not acceptable because of the fact that the assessee disclosed the additional income only after he was confronted by the D.I. (Inv.), New Delhi with certain evidence. Had he not been confronted he would not have disclosed this additional amount as income/disallowable expenditure. So there was a definite concealment on the part of the assessee. As such Penalty U/s. 271(1) of the Act is leviable.

In both the assessments made U/s. 143(3) and 147, taxes were charged U/s. 115JB. Hence the amount of tax sought to be evaded is calculated at Rs. 22,95,000/- being the difference between taxes on the total income assessed U/s. 147 and U/s. 143(3).

The assessee is directed to pay Rs. 22,95,000/- as Penalty U/s. 271(1)(c) of the Income Tax Act, 1961, being 100% of the tax sought to be evaded.

The order is passed with the approval of the addl. C.I.T., Range-IV(C), Kolkata".

5. In an appeal preferred by the assessee the CIT (Appeals) reversed the order of the Assessing Officer on the basis of the following reasoning:-

"14. All the case laws relied upon by the appellant have been carefully considered. Although search might have been conducted in the premises of M/s. U.P. Distillers" Association during the course of which some papers might have been found out indicating certain payments made by the assessee to M/s. U.P. Distillers" Association, such recordings in papers found out in the case of a third party, by itself, would not entitle the Department to initiate actions in the hands of the assessee, as has been held in several judicial pronouncements mentioned above. The department has not brought any independent evidence on records to prove that the alleged payments reflected in the seized papers were actually made by the appellant. The assessee itself filed a revised return offering the amount found out in the papers with the third party to be included within its total income and at the later stage of the proceedings also, cooperated with the A.O. in completing the re-assessment by including the amount under consideration in its total income.

In this context it is appropriate to consider the assessee's letter dated 27.03.2006 to The Jt. Director of Income-tax (Inv.), stating as under:-

"Your goodself has also informed that certain payments were made by us to UPDS which were in the records belonging to UPDA.

At this stage, we would not like to make any comment about the genuineness of the aforesaid information.

However, we are offering the amount, representing the alleged payments made by us to UPDA during the Financial Years pertaining to A.Y. 2003-04, 004-05 and 05-06 as our income and are also paying tax on it, to avoid protracted litigation and to put a quietus to the whole issue.

In the light of our voluntarily surrendering the aforesaid sum as our income in the respective years to which they pertain, it is requested that no penalty/prosecution shall be imposed/launched against us".

15. The assessee also duly paid tax on the additional amount of income. All along the assessee has maintained that the additional income has been offered for the purpose of buying peace with the Department and to negate the course of a protracted litigation with the Department. The various decisions relied upon by the assessee and as discussed above and especially the one of the Supreme Court in the case of Suresh Chandra Mittal (supra) strongly support the view that no penalty is liable in this case proposition. It is also noted that the case of the assessee stands on a much better footing than the case of M/s. Enfield Industries Ltd. (supra) decided by the Hon"ble ITAT, in as much as in that case, the A.O. himself had detected certain income during the course of the block assessment proceedings which had not been disclosed by the assessee. Even that case was decided in favour of that assessee on the issue of levy of penalty for concealment income. Relying on the ratios of that judgment, and also taking into consideration the judgments in the various cases as mentioned and discussed above, it is held that this is not a case fit for levy of penalty u/s. 271(1)(c) of the

Income tax Act, 1961 and the impugned penalty is therefore, cancelled."

6. The revenue unsuccessfully challenged the order of the CIT (Appeals) before the learned Tribunal which agreeing with the CIT (Appeals) held as follows:-

"Since the assessee has itself offered the additional income and the department has not brought anything positive on record to substantiate the conclusion that the assessee has mens rea of concealment of its true income or furnishing inaccurate particulars thereof. In our considered opinion, the action of the AO in holding the assessee liable for penalty under section 271(1)(c) was not correct and the CIT(A) was justified in cancelling such penalty in case of both the years in view of ratios of the decisions of various Hon'ble High Courts and the decision of the "D" Bench of Tribunal's Kolkata Bench in the case of M/s. Enfield Industries Ltd. (supra). We, therefore, uphold the orders of the CIT(A) and dismiss the grounds raised by the Revenue in case of both the appeals."

7. Md. Nizamuddin, learned Advocate for the revenue/appellant submitted that the learned Tribunal and the CIT (Appeals) both stressed that the assessee itself offered the additional income. The department did not find out that there had been any concealment of income on the part of the assessee which, he submitted, is factually incorrect. He added that it would appear from the assessment order that the so called voluntary act arose out of a search conducted under Section 132 of the Act in the office of U.P. Distilleries Association.

8. From the seized records it transpired that a sum of Rs. 3.40 crores was paid by the assessee. When this fact was brought to the notice of the assessee and his record was called for, it is at that stage that the assessee offered to pay tax on the sum without answering the question posed to him. Therefore, it is not a case wherein a disclosure was voluntarily made. Far less is that an act arising out of any pricking of conscience. In any case he added that the so-called voluntary disclosure cannot alter the consequences. He, in support of his submissions, relied upon a judgment of the Apex Court in the case of MAK Data P. Ltd. Vs. Commissioner of Income Tax-II, (2014) 2 AD 263 : (2013) 263 CTR 1 : (2013) 358 ITR 593 : (2013) 14 JT 144 : (2013) 13 SCALE 509 : (2014) 1 SCC 674 : (2014) 2 SCJ 438 wherein the following view was taken:-

"5. THE AO, in our view, shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

6. ASSESSEE has only stated that he had surrendered the additional sum of Rs. 40,74,000/- with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. Statute does not recognize those types of defences under the explanation 1 to Section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the Appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share applications forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961.

7. THE AO has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing. The scope of Section 271(1)(c) has also been elaborately discussed by this Court in Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, (2008) 219 CTR 617 : (2008) 133 ECC 247 : (2008) 159 ECR 247 : (2008) 231 ELT 3 : (2008) 306 ITR 277 : (2008) 11 JT 255 : (2008) 13 SCALE 233 : (2008) 13 SCC 369 : (2008) 174 TAXMAN 571 : (2009) 11 Vat Reporter 63 : (2008) 18 VST 180 and Commissioner of Income Tax, Delhi Vs. Atul Mohan Bindal, (2009) 225 CTR 248 : (2009) 317 ITR 1 : (2009) 11 JT 465 : (2009) 11 SCALE 592 : (2009) 9 SCC 589 : (2009) 13 SCR 464 : (2009) 183 TAXMAN 444 : (2009) 9 UJ 4172 ."

9. Mr. Kapoor, learned senior Advocate, appearing for the assessee drew our attention to the first Explanation to Section 271(1) which reads as follows:-

"Explanation 1.- 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 [Assessing Officer] or the [***] [Commissioner (Appeals)] [or the [Principal Commissioner or Commissioner]] 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."

10. He contended that the question of applicability of Section 271 may arise provided the Assessing Officer is satisfied that the assessee concealed his income. After such satisfaction is arrived at he is supposed to call upon the assessee to furnish an explanation. In case the assessee fails to offer an explanation or offers an explanation which is found by the Assessing Officer to be false or the assessee offers an explanation which he is not able to substantiate and also fails to prove that the explanation offered was bona fide, it is in those cases, the amount of income concealed can be added or disallowed. He contended that in this case no such exercise was undertaken at all.

11. He drew our attention to the assessment order which we have quoted above.

12. He submitted that a search may have been conducted in the office of U.P. Distilleries Association. From the sealed records of U.P. Distilleries Association a sum of Rs. 3.40 crores might have been found to have been deposited or paid by the assessee. But the fact remains that the assessee never owned up any such alleged payment or deposit with U.P. Distilleries Association in the absence whereof there was no question of any income having been concealed and the order passed by the Assessing Officer proposing to initiate proceeding under Section 271(1)(c) and the subsequent proceedings under the aforesaid section are all without any basis. The jurisdictional fact for initiating a penalty proceedings is altogether absent. Therefore, the order levying penalty was rightly set aside by the C.I.T.(A) which was endorsed by the learned Tribunal. He submitted that the C.I.T.(A), in its order dated 27th June, 2007, has recorded that "the department has not brought any independent evidence on records to prove that the alleged payments reflected in the seized papers were actually made by the appellant". He submitted that this finding has been upheld by the Tribunal and the Tribunal is the final fact finding authority with which the High

Court cannot interfere unless the finding is perverse which he added is not the case of revenue. He in support of his submission drew our attention to a judgment of the Apex Court in the case of Sudarshan Silks and Sarees Vs. Commissioner of Income Tax, Karnataka, (2008) 216 CTR 12 : (2008) 300 ITR 205 : (2008) 6 JT 144 : (2008) 7 SCALE 56 : (2008) 12 SCC 458 : (2008) 169 TAXMAN 321 wherein Their Lordships opined that "The Tribunal is the final court of fact" (see paragraph 16)

13. He also drew our attention to paragraph 12 of the judgment, which reads as follows;-

"12. The only contention raised by the learned counsel for the appellant is that the Tribunal is the final fact-finding authority and its decision on the facts can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on facts is perverse, in the sense that it is such as could not reasonably have been arrived at on the material placed before the Tribunal. In the absence of such a question having been claimed, the High Court was obliged to accept the findings of fact arrived at by the Tribunal and then proceed to decide the question of law referred to it. Relying upon the two judgments of this Court in K. Ravindranathan Nair v. CIT and T. Ashok Pai v. CIT, it was contended that the High Court exceeded its jurisdiction in coming to the conclusion that the findings recorded by the Tribunal were perverse as no question of law to that effect had either been claimed or referred by the Tribunal to the High Court for its opinion."

14. He also drew our attention to a judgment of the Andhra Pradesh High Court in the case of Commissioner of Income Tax Vs. H. Abdul Bakshi and Bros., (1987) 1 APLJ 1 : (1986) 160 ITR 94 for the following proposition:-

"It should be remembered that penalty proceedings are entirely distinct from assessment proceedings and howsoever relevant and good the findings in the assessment proceedings may be, they are not conclusive so far as the penalty proceedings are concerned."

15. He drew our attention to a judgment of the Madhya Pradesh High Court in the case of Commissioner of Income Tax Vs. Suresh Chandra Mittal, (2000) 158 CTR 26 : (2000) 241 ITR 124 : (2000) 2 MPLJ 82 : (2002) 123 TAXMAN 1052 . What had happened in that case and the view taken by the Court are as follows:-

"Shorn of all details, it emerges that the assessee first filed his returns for the assessment years 1983-84, 1984-85, 1985-86 and 1986-87 showing income ranging between Rs. 10,000 and Rs. 12,000. Later action under section 132 was taken against him which led to reopening of the assessment. A notice under section 148 was served on him, and pursuant thereto he filed revised returns of income for these assessment years showing higher income. Eventually the assessment orders were passed and the returns submitted regularized under section 148.

Meanwhile the Assessing Officer took penalty proceedings against the assessee under section 271 and levied penalty for all the assessment years rejecting the assessee's contention that he had revised his returns suo motu and had offered additional income to buy peace of mind and to avoid litigation.

The assessee took appeal against this to the Commissioner of Income-tax (Appeals) but failed. He then carried the matter to the Tribunal and succeeded. The Tribunal held as under:

The assessee had no chance of carrying through his explanation and the Assessing Officer too did not record any finding as to the acceptability or otherwise of the explanation of the assessee. Under these circumstances, the proviso to Explanation 1 to section 271 is not attracted. The Revenue did not at all discharge the burden to prove that there was concealment of income by the assessee. It simply rested its conclusion on the act of voluntary surrender by the assessee, which obviously was done in good faith and to buy peace.

The Tribunal also placed reliance on the Supreme Court judgment in *Sir Shadi Lal Sugar and General Mills Ltd. and Another Vs. Commissioner of Income Tax, Delhi*, AIR 1987 SC 2008 : (1987) 31 ELT 325 : (1987) 168 ITR 705 : (1987) 3 JT 189 : (1987) 2 SCALE 153 : (1987) 4 SCC 722 : (1987) 3 SCR 692 , in support holding as under (page 713):-

We find that the assessee admitted that these were the incomes of the assessee but that was not an admission that there was deliberate concealment. From agreeing to additions, it does not follow that the amount agreed to be added was concealed income. There may be a hundred and one reasons for such admission, i.e., when the assessee realises the true position, it does not dispute certain disallowances but that does not absolve the Revenue from proving the mens rea of a quasi-criminal offence.

We find ourselves in agreement with the view taken by the Tribunal. It is well settled that under section 271(1)(c), the initial burden lies on the Revenue to establish that the assessee had concealed the income or had furnished inaccurate particulars of such income. The burden shifts to the assessee only if he fails to offer any explanation for the undisclosed income or offers an explanation which is found to be false by the assessing authority. However, the proviso to Explanation-1 provides for shifting of this burden again where the explanation offered by the assessee is found to be bona fide.

In the present case, though it is true that the assessee had not surrendered at all and that he had done so on the persistent queries made by the Assessing Officer, but once the revised assessment was regularised by the Revenue and once the assessing authority had failed to take any objection in the matter, the declaration of income made by the assessee in his revised returns and his explanation that he had done so to buy peace with the Department and to come out of vexed litigation could be treated as bona fide in the facts and circumstances of the case. Therefore, the Tribunal was justified in cancelling the

penalty levied by the Assessing Officer and affirmed by the Commissioner of Income-tax (Appeals) in the facts and circumstances of the case. This reference is accordingly answered in the affirmative holding that the Tribunal was justified in doing so."

16. The aforesaid judgment was challenged by the Revenue before the Supreme Court, but the Supreme Court refused to interfere which has been reported in Commissioner of Income Tax Vs. Suresh Chandra Mittal, (2001) 170 CTR 182 : (2001) 251 ITR 9 : (2003) 11 SCC 729 .

17. With respect to the burden of proof, Mr. Kapoor also drew our attention to a judgment of the Punjab and Haryana High Court in the case of Commissioner of Income Tax Vs. Rajiv Garg, Siya Ram Garg, Sanjay Garg and Sushil Kumar Garg, (2009) 224 CTR 321 : (2009) 313 ITR 256 , wherein the following views were expressed:-

"After hearing the learned counsel for the appellant, we do not find any merit in this appeal. Undisputedly, the assessee filed the return of income declaring its total income at Rs. 47,05,230, which, inter alia, included long-term capital gain on sale of shares amounting to Rs. 29,74,951. The return was processed in terms of section 143(1)(a) of the Act on March 15, 1999. Subsequently, on the basis of some information with regard to sale proceeds of the shares amounting Rs. 32,40,385 on which the capital gain was declared at Rs. 29,74,951 by the assessee in the original return, a notice under section 148 of the Act was issued. Pursuant to the said notice, the assessee filed the revised return of income showing higher income. The said return of income was accompanied by a note in which the assessee submitted that he surrendered the entire amount of sale proceeds of shares to buy peace of mind and to avoid hazards of litigation and also to save himself from any penal action. Later on, on the basis of revised return, the assessment was framed and the return submitted by the assessee was regularized as it is. During the course of assessment, the aforesaid explanation given by the assessee was neither rejected nor was it held to be mala fide. The Tribunal has recorded a pure finding of fact to the effect that the Revenue has not placed on record any material or evidence to discharge its burden of proving concealment. In the assessment order no such finding was recorded. The Department has simply rested its conclusion on the act of the assessee of having offered additional income in the return filed in response to the notice issued under section 148 of the Act. The Tribunal has further held that the additional income so offered by the assessee was done in good faith and to buy peace. The Tribunal has relied upon the decision of the apex court in the case of CIT v. Suresh Chandra Mittal Commissioner of Income Tax Vs. Suresh Chandra Mittal, (2001) 170 CTR 182 : (2001) 251 ITR 9 : (2003) 11 SCC 729 , wherein the Supreme Court has upheld the decision of the Madhya Pradesh High Court, Commissioner of Income Tax Vs. Suresh Chandra Mittal, (2000) 158 CTR 26 : (2000) 241 ITR 124 : (2000) 2 MPLJ 82 : (2002) 123 TAXMAN 1052 , where in similar circumstances it was held that the initial burden lies on the Revenue to

establish that the assessee had concealed the income or had furnished inaccurate particulars of such income. The burden shifts to the assessee only if he fails to offer any explanation for the undisclosed income or offers an explanation which is found to be false by the assessing authority. In the present case, in pursuance of the notice under section 148 of the Act, the revised return of income was filed in which the entire income was surrendered with an explanation. The revised assessment was regularized by the Revenue. The assessing authority had failed to take any objection that the declaration of income made by the assessee in his revised return and in his explanation were not bona fide. Therefore, in view of the aforesaid finding, the Tribunal was justified in upholding the order of the Commissioner of Income-tax (Appeals), whereby the penalty imposed under section 271(1)(c) of the Act by the Assessing Officer was ordered to be deleted."

18. In summing up, Mr. Kapoor reiterated that there has been no concealment and no evidence of any alleged concealment was adduced in the absence whereof the penalty could not have been levied. He added that in revenue matters there is no scope for any equity. Unless the alleged concealment has been brought within the letter of law, the question of penalizing the assessee will not arise. He in support of his submission read out paragraph 34 from the judgment of the Apex Court in the case of Commissioner of Income Tax, Delhi Vs. Atul Mohan Bindal, (2009) 225 CTR 248 : (2009) 317 ITR 1 : (2009) 11 JT 465 : (2009) 11 SCALE 592 : (2009) 9 SCC 589 : (2009) 13 SCR 464 : (2009) 183 TAXMAN 444 : (2009) 9 UJ 4172 , quoting Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, (2008) 219 CTR 617 : (2008) 133 ECC 247 : (2008) 159 ECR 247 : (2008) 231 ELT 3 : (2008) 306 ITR 277 : (2008) 11 JT 255 : (2008) 13 SCALE 233 : (2008) 13 SCC 369 : (2008) 174 TAXMAN 571 : (2009) 11 Vat Reporter 63 : (2008) 18 VST 180 . The said paragraph 34 reads as follows:-

"34. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11-AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the authority concerned would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11-A. That is what Dharamendra Textile decides."

19. The last submission advanced by Mr. Kapoor was that by the impugned judgment penalty was levied for the years 2003-04, 2004-05 and 2005-06. The present appeal is directed against a judgment of the learned Tribunal passed on 18th January, 2008, which pertains to the assessment years 2003-04 and 2004-05. The Revenue by the present appeal has challenged the impugned judgment in so far as the same is relatable to the assessment year 2004-05. There is nothing to show that identical challenge was thrown to the impugned judgment in so far as the same is relatable to the assessment year 2003-04.

20. Mr. Nizamuddin, learned advocate appearing for the Revenue, is also not aware as to whether the impugned judgment, in so far as the same is relatable to the assessment year 2003-04, has been challenged by any separate appeal.

21. Mr. Kapoor submitted that in the absence of any challenge to the impugned judgment in so far as the same is relatable to the assessment year 2003-04, the present appeal is also bad because the law is that rule of consistency has to be applied. He submitted while on the same set of facts the order imposing penalty has been set aside by the learned Tribunal which is not under challenge for the assessment year 2003-04 then Revenue cannot be heard to maintain a challenge to the same judgment in so far as the same is relatable to the assessment year 2004-05. He in support of his submission relied upon an unreported order dated 4th September, 2012 passed by the Apex Court in the case of CIT, Kol. Vs. M/s. PFH Mall and Retail Management Pvt. Ltd., dismissing an appeal preferred by the Revenue applying the principle of consistency. The order reads as follows:-

"Heard learned counsel on both sides.

Delay condoned.

Leave granted.

These civil appeals filed by the Department concern Assessment Years 2003-04 and 2002-03.

The question which arises for determination in these appeals is "whether the income in question is liable to be taxed as business income or as income from house property"?

From the records, we find that, for the earlier Assessment year 2001-02, the Income Tax Appellate Tribunal [for short, "ITAT"] has taken the view that income in question is business income. This view has been upheld by the High Court in these cases. In civil appeal arising out of S.L.P. (C) No. 6756 of 2009, no ground has been taken to challenge the decision of the High Court on its finding concerning Assessment year 2001-02. Applying the rule of consistency, these civil appeals filed by the Department are dismissed with no order as to costs."

22. We have heard the rival submission advanced by the learned counsel appearing for the parties. In order to answer the question, indicated above one has to notice the provision as regards the concealment of income appearing from Section 271(1)(c). The Section provides that:-

"Section 271 Failure to furnish returns, comply with notices, concealment of income, etc.

Section (1) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person?

(a)

(b)

"(c) Has concealed the particulars of his income or furnished inaccurate particulars of such income"

or

(d)

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

23. From the bunch of documents provided to us by Mr. Kapoor, it appears that a summons under Section 131 dated 17th March, 2006 was issued to the assessee requiring the latter to appear on 30th March, 2006 at 3 p.m., both for the purpose of giving evidence and producing documents required and indicated therein.

24. From the letter dated 27th March, 2006 addressed by the assessee to the Joint Director of Income Tax, it appears that the assessee was informed that the summons have been issued with regard to the payments appearing to have been made by the assessee to U.P. Distilleries Association. The assessee rather than appearing on the appointed day to give evidence and to produce documents as required by the summons dated 17th March, 2006 wrote to the Joint Director of Income Tax, inter alia, as follows:-

"Your goodself has also informed that certain payments were made by us to UPDA which were in the records belonging to UPDA.

At this stage, we would not like to make any comment about the genuineness of the aforesaid information.

However, we are offering the amount, representing the alleged payments made by us to UPDA during the Financial Years pertaining to Assessment Years 2003-04, 2004-05 and 2005-06, as our income and are also paying tax on it, to avoid protracted litigation and to put a quietus to the whole issue.

In the light of our voluntarily surrendering the aforesaid sum as our income in the respective years to which they pertain, it is requested that no penalty/prosecution shall be imposed/launched against us."

25. The assessee thereafter filed a revised return under the cover of a letter dated 3rd April, 2006 stating therein, inter alia, as follows:-

"The computation of Total Income made in this Return is inclusive of a sum of Rs. 340.00 Lacs being the alleged payments made by us to U.P. Distilleries" Association (UPDA) during the Financial Year relevant to the above mentioned Assessment Year, which are not allowable by virtue of Explanation to Section 37(1) of Income Tax Act, 1961. The additional liability pursuant to this amounts to Rs. 25.35 lacs which has been adjusted by us against the amount Refundable from the Department for the Assessment year.

Although, the Company does not agree to have made any such payments to UPDA, the Company has agreed to include the amount in its Return of Income

and pay tax thereof. This is being done by the Company just to buy peace and put an end to the protracted litigation. In this connection, a copy of the letter dated 27.03.2006 addressed to Jt. Director of Income Tax (Inv.), (OSD), Unit ? II, New Delhi, is enclosed and marked as Annexure ? B.

Since the assessee is revising income voluntarily and in good faith only to buy peace and to avoid protracted litigation, penalty proceedings and/or any consequential penal action against the Company would not lie."

26. On 18th April, 2006 notice under Section 147 was issued requiring the assessee to file a return for the assessment year 2004-2005. The assessee through his advocate by a letter dated 22nd April, 2006 replied stating that the revised return filed on 3rd April, 2006 may be treated as a return filed under Section 148. Thereafter, the assessment was made on 19th May, 2006 under Section 143(3)/147 which has been noticed above.

27. It may be true that the assessee did not expressly own up payment of a sum of Rs. 3.40 crores to U.P. Distilleries Association. It may also be true that the revenue did not adduce any proof to show that any such payment was made by the assessee to U.P. Distilleries.

28. The omission on the part of the assessee to answer the question as regards the payment to U.P. Distilleries would attract the presumption laid down in illustration (h) to Section 114 of the Evidence Act which provides as follows:-

"that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;"

29. On the top of that the submission made on behalf of the assessee before the Assessing Officer appearing from the assessment order reads as follows:-

"It was submitted by the A/R, that to avoid protracted litigation and to put a quite to the whole issue the assessee had offered this amount as disallowable item u/s. 37(1) of the Act, through the return dated 3rd April, 2006"

30. When the case of the assessee is that the return already filed by him for the assessment year 2004-2005 under Section 139 includes an expenditure disallowable under Section 37(1) of the I.T. Act, it would automatically follow that inaccurate particulars had been furnished in the return originally filed, assessment whereof was completed on 28th December, 2005.

31. The provisions of Sub-section 1 of Section 271 noticed above suggests that if the assessee furnishes inaccurate particulars coupled with absence of satisfactory explanation, that would per se make the assessee liable to pay penalty. Concealment of income in that case shall be presumed provided assessment leads to addition or disallowance of any amount in computing his total income.

32. In the case, before us the assessee on his own showing had furnished inaccurate particulars. The assessee admitted that the return originally filed by him included expenditure disallowable under Section 37(1) which occasioned the

revised return filed by him by which a sum of Rs. 3.40 crores was added by the assessee himself to his total income originally returned.

33. The submission advanced by Mr. Kapoor that the Assessing Officer did not call for any explanation from the assessee is not factually correct because it would appear from the assessment order dated 30th March, 2007 quoted above that a notice under Section 271(1)(c) was issued to which the assessee duly replied by its letter dated 1st June, 2006 and offered an explanation that there was no deliberate concealment which was not acceptable to the Assessing Officer. He as such passed an order under Section 271(1). It is, therefore not correct to say that the exercise calling for an explanation from the assessee was not undertaken.

34. The assessee's case is that there was no deliberate concealment. Clause (c) of Section 271(1) originally qualified an act of concealment of income or furnishing of inaccurate particulars with the expression "deliberately" which was omitted by the Finance Act, 1964 w.e.f. 1.4.1964 as a result concealment of income or inaccurate particulars need not originally have been furnished deliberately. The use of the expression "deliberately" was a pointer to show that mens rea was a necessary element. With the omission of the expression "deliberately", mens rea is no longer a prerequisite for imposition of penalty. It is now a case of strict liability. In the case of Dilip N. Shroff Karta of N.D. Shroff Vs. Joint Commissioner of Income Tax, Special Range Mumbai and Another, (2007) 210 CTR 228 : (2007) 291 ITR 519 : (2007) 8 SCALE 256 : (2007) 6 SCC 329 : (2007) 7 SCR 499 , mens rea was considered to be a necessary ingredient for levy of penalty. But in the case of Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, (2008) 219 CTR 617 : (2008) 133 ECC 247 : (2008) 159 ECR 247 : (2008) 231 ELT 3 : (2008) 306 ITR 277 : (2008) 11 JT 255 : (2008) 13 SCALE 233 : (2008) 13 SCC 369 : (2008) 174 TAXMAN 571 : (2009) 11 Vat Reporter 63 : (2008) 18 VST 180 it was held that the view in the case of Dilip. N. Shroff was not correct. It has been held that penalty under Section 271(1)(c) is a civil liability and the willful concealment is not an essential ingredient. Reference in this regard may be made to paragraph 18 of the judgment which reads as follows:-

"The Explanations appended to Section 271(1)(c) of the IT Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in Dilip N. Shroff case has not considered the effect and relevance of Section 276-C of the IT Act. Object behind enactment of Section 271(1)(c) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Willful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276-C of the IT Act."

35. The judgments cited by Mr. Kapoor are all distinguishable because they proceeded on the theory of willful concealment. In the case of Sir Shadilal Sugar

and General Mills (supra) Their Lordships opined that "there may be a hundred and one reasons for such admission....." because the relevant assessment year was with respect to pre-amendment period. The judgment of M.P. High Court in the case of CIT Vs. Suresh Chandra Mittal cited by Mr. Kapoor followed that judgment of the Supreme Court. The judgment is also distinguishable on facts because in that case the Tribunal had held that "the assessee had no chance of carrying through his explanation". But, in this case explanation was called for and explanation was offered by the assessee which was found not acceptable in the order dated 30th March, 2007.

36. The views expressed in the case of CIT Vs. Suresh Chandra Mittal also appear to be contradictory to the views expressed by the Apex Court in the case of Mak Data Private Limited (supra) wherein it was held that "explanation to Section 271(1) raises a presumption of concealment when a difference is noticed by the AO between return and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence."

37. The mere fact that the special leave petition against the judgment in the case of Suresh Chandra Mittal (supra) was dismissed does not alter the position. The judgment in the case of CIT Vs. Rajib Garg (supra) cited by Mr. Kapoor does not help the assessee for the same reason, that the views expressed therein are contrary to the views of the Apex Court in the case of Mak Data Private Limited (supra) as discussed above.

38. There can be no quarrel with the proposition that the Tribunal is the final fact finding authority. The Tribunal was correct in observing that no independent evidence was adduced by the Revenue to prove that the alleged payments reflected in the seized papers were actually made by the appellant. But on that premise, the inference could not have been drawn that there was no concealment of income arising out of furnishing of inaccurate particulars as demonstrated by us.

39. It is true that in Revenue matters there is no scope for equity but in the case before us the charge of concealment of income arising out of furnishing inaccurate particulars has duly been proved for the reasons discussed above.

40. The last submission advanced by Mr. Kapoor that in the absence of any appeal against the order for the assessment year 2003-04, the present appeal cannot be maintained has also not impressed us. The judgement cited by him in the case of CIT Vs. M/s. PFH Mall and Retail Management Pvt. Ltd. (supra) is distinguishable.

41. In that case, the Supreme Court had refused to entertain the appeal applying rule of consistency because the view of the High Court sought to be assailed was also taken in connection with an earlier assessment year which was not challenged.

42. A view taken by the High Court stands on a different footing than the view

taken by the Tribunal. The Tribunal is a statutory body. A judgment rendered by the Tribunal cannot attract the principles of res judicata whereas a judgment rendered by the High Court would certainly attract the principles of res judicata.

43. For the aforesaid reasons, we are unable to accept the submissions of Mr. Kapoor. The question is answered in the negative and in favour of the Revenue.

44. The appeal is thus allowed.