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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 302 OF 2002

Veena Estate Pvt. Ltd.,]
Conwood House,]
Gen. A. K. Vaidya Marg,]
Goregaon (East) Bombay – 400 063] …Appellant

VERSUS

Commissioner of Income-Tax]
Mumbai City IX, Mumbai.] …Respondent

APPEARANCES-
Ms Aarti Vissanji, a/w Mr S. J. Mehta, for the Appellant.
Mr Devvrat Singh, for the Respondent.

CORAM : **M.S.Sonak & Jitendra Jain, JJ.**

RESERVED ON : **29 January 2025**

PRONOUNCED ON : **31 January 2025**

JUDGMENT (*Per MS Sonak J*):-

1. Heard learned counsel for the parties.

2. This Appeal was admitted on 14 September 2004 on the following substantial question of law:-

> "Whether the Tribunal erred on the facts and in the circumstances of the case and in law in reversing the order of the CIT(A) and confirming the penalty of Rs.33,34,096/- (Rupees Thirty three Lacs Thirty Four

> Thousand Ninety Six only) levied by the Assessing Officer under Section 271(1)(c) of the Act?"

3. The Appellant tried to raise additional grounds in support of this Appeal. However, a detailed order dated 11 January 2024, passed by G. S. Kulkarni and Jitendra Jain, JJ, did not allow this.

4. Ms. Aarti Vissanji, submitted that the Appellant had neither concealed any fact nor furnished any inaccurate particulars. She submitted that withdrawal of money from the partnership firm M/s. Nirmal Enterprises and the consequent reduction in capital balance to Rs.17,45,000/- was reflected in the capital accounts and the income return. She submitted that once primary facts were disclosed, it was up to the Assessing Officer to decide what inferences could be drawn from them. She submitted that because no such inferences were drawn, no case was made out for imposing any penalty upon the Appellant. She relied on **Calcutta Discount Co. Ltd.**[1], **Ananta Landmark Pvt. Ltd.**[2] and **Mangalam Publications vs CIT**[3]

5. Ms. Vissanji submitted that the Income Tax Appellate Tribunal (ITAT) erred in relying upon the provisions of Explanation-1 to Section 147 of the Income Tax Act, 1961 (IT Act, 1961) to hold that mere production of books of account did not amount to disclosure. She submitted that Explanation-1 applied only to books or other documents produced before the Assessing Officer. The balance sheets and other documents which the Appellant had filed along with the return of income

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1 41 ITR 199-202, 207 (SC)

2 439 ITR 168, 179 (Bom)

3 461 ITR 159, 190

were not books of account to which Explanation-1 would have been applied. She submitted that there was no concealment of primary facts since all the relevant facts were disclosed in the Profit and Loss Accounts. She relied on **CIT vs Taj Borewells**[4] and **Gujarat Ginning & Mfg. Co. Ltd. vs. CIT**[5]

6. Ms. Vissanji submitted that in the absence of any statutory provision and/or requirement in return obliging the Appellant to disclose any withdrawals from its capital account specifically, no penalty could have been levied on the Appellant for concealing income or furnishing inaccurate particulars. She submitted that such an approach was contrary to the law laid down in **CIT vs. Smt. P.K.Kochammu Amma**[6], **Muthiah Chettiar**[7] and**CIT vs Sohan Lal**[8]

7. Ms. Vissanji submitted that the ITAT erred in styling the transaction of the Appellant entering a partnership firm under the name and style of M/s Nirmal Enterprises, contributing stock-in-trade (Agripada Plot) valued at Rs.1,04,53,500/- to the firm's account and withdrawing the amounts from its capital account to pay of its liability as a "device" to evade tax. She submitted that this transaction was no different from that in the case of **Jamnalal and Sons Ltd vs Commissioner of Income-tax, Nagpur**[9]**.** She submitted that the coordinate bench of this Court, on similar facts, held that the assessee entering into a partnership and making a contribution by valuing the plots could not be regarded as some colourable device to

4 291 ITR 232, 237-240 (Mad)

5 108 ITR 674, 688

6 (SC) 125 ITR 624

7 74 ITR 183

8 143 ITR 901

9 (2017) 77 taxmann.com 350 (Bombay)

evade tax. She submitted that the ITAT's view runs counter to that of this Court in the case of **Jamnalal Sons Ltd.** (supra).

8. Ms. Vissanji submitted that in any event, since this was a matter where two views were possible given the decision of this Court in **Jamnalal Sons Ltd.** (supra), no penalty could have been levied as held in the case of **Durga Kamal Rice Mills vs Commissioner of Income-Tax**[10]

9. Ms. Vissanji finally submitted that mere rejection of a claim by an assessee does not amount to furnishing of inaccurate particulars based upon which any penalty could have been levied under Section 271(1)(c). For this she relied on **CIT vss Reliance Petroproducts Pvt. Ltd.**[11]

10. For all the above reasons, Ms Vissanji submitted that the substantial question of law should be answered favouring the Appellant and against the Revenue.

11. Mr. Devvrat Singh, the learned counsel for the Respondent, defended the ITAT's order based on the reasoning reflected therein. He submitted that no substantial question of law arises in this Appeal and that, in any event, such question should be answered against the Appellant and in favour of the Revenue.

12. Mr. Singh submitted that by the ITAT's order dated 22 February 1993, disposing of ITA No. 3330/BOM/88 and ITA No.5910/BOM/91, the ITAT confirmed the addition of Rs. 52,92,218/- to the Appellant's income after recording a finding of fact that the transaction with the firm Nirmal

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[10] 265 ITR 25, 30 (H) (CAL)

[11] 322 ITR 158, 166.

Enterprises was only a device to evade tax. He submitted that this addition has attained finality. He submitted that even the findings of suppression of material facts have attained finality in the quantum proceedings. He, therefore, submitted that there was no error in the ITAT's order imposing penalty and the substantial question of law should be answered against the Appellant.

13. Mr. Singh submitted that the Appellant's case was squarely covered by the decision of the Hon'ble Supreme Court in **CIT vs Sunil Siddharthbhai**[12] **.** Based upon this precedent and the other material on record, the ITAT was justified in imposing a minimum penalty on the Appellant.

14. Mr. Singh submitted that this Appeal may be dismissed for all the above reasons.

15. The rival contentions now fall for our determination.

16. This Appeal concerns the Assessment Year 1984-85.

17. The Appellant, a company incorporated under the Companies Act of 1956, was involved in the real estate and construction business. In 1982, it purchased a plot of land at Agripada for a consideration of Rs.25,00,000/-. It claimed having spent an amount of Rs.26,61,283/- towards development and construction on the said plot.

18. On 19 September 1983, the Appellant and six others entered into a partnership under the name and style of M/s Nirmal Enterprises. Less than a year after purchasing the said plot for Rs.25,00,000/—and expending an additional amount

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[12] 156 ITR 509 (SC)

of approximately Rs.26,00,000/—towards construction and development thereon, the Appellant revalued this plot at Rs.1,04,53,500/—and introduced the same into the partnership firm as its capital.

19. The Appellant filed a return of income for the Assessment Year 1984-85 on 20 September 1994, declaring "Nil" income. The Appellant computed its income for the year before deducting brought forward losses of the earlier Assessment years at Rs.33,89,467/-. From this, the Appellant deducted an amount of Rs.33,89,467/- which it claimed to be "brought forward unabsorbed losses of earlier years". On this basis, a Nil total income was disclosed in the return of income for the Assessment Year 1984-85. The Assessing Officer accepted this.

20. The Commissioner of Income Tax initiated proceedings under Section 263 of the IT Act based *inter alia* on the decision of the Hon'ble Supreme Court in the case of *Sunil Siddharthbhai* (supra). On concluding that the parameters for exercising powers under Section 263 of the IT Act were fulfilled, the Assessing Officer was directed to once again assess the Appellant's returns for the assessment year 1984-85.

21. The Assessing Officer, upon fresh assessment, concluded that the Appellant had not only transferred the stock-in-trade at the market value but also withdrawn the profits arising therefrom soon thereafter. The Assessing Officer held that this crucial fact was not disclosed, and the events were so

arranged that the Appellant enjoyed the benefits of the amounts, though the tax due on such amounts was never paid. Accordingly, he brought the amount of Rs. 52,92,218/— to tax as profit on transfer of stock-in-trade to M/s Nirmal Enterprises.

22. Aggrieved, the Appellant appealed to the Commissioner of Income Tax (Appeals). The Appeal was allowed, and the addition of Rs. 52,92,218/- ordered by the Assessing Officer was deleted. The Revenue appealed to the ITAT, challenging the Commissioner of Income Tax (Appeals)'s order dated 30 March 1988. The Appellant also appealed the same order, arguing that the powers under Section 263 should not have been exercised.

23. The ITAT, by its order dated 22 February 1993, allowed the Revenue's Appeal but rejected the Appellant's Appeal against the order under Section 263 of the IT Act.

24. The record also shows that the Appellant sought a reference to this Court, which the ITAT rejected on 10 January 1994. The Appellant filed Income Tax Application No. 43 of 1994 before this Court in which Rule was made absolute in respect of Q.1 only by order dated 29 March 1996. However, Ms Vissanji admitted that this matter was not pursued any further, as a consequence of which the assessment on quantum has attained finality.

25. The department initiated penalty proceedings against the Appellant under Section 271(1)(c) of the IT Act. On 6 September 1993, the Appellant filed a detailed reply claiming that its case was covered by the principle laid down by the Hon'ble Supreme Court in **Commissioner of Income Tax, West Bengal vs Hind Construction Ltd**[13] and that it did not fall within the ratio of *Sunil Siddharthbhai* (supra).

26. The Assessing Officer rejected the Appellant's case and imposed the minimum prescribed penalty of Rs.33,34,096/-. The Appellant appealed to the Commissioner of Income Tax (Appeals), which allowed the Appeal. Therefore, the Revenue appealed to the ITAT, which, by the impugned order dated 30 October 2001, set aside the order of the Commissioner of Income Tax (Appeals) and restored the penalty of Rs.33,34,096/—imposed by the Assessing Officer.

27. Hence, this Appeal under Section 260A of the IT Act on the above-referred substantial questions of law.

28. As noted above, the issue of the addition of Rs.52,92,218/- to the Appellant's income has attained finality. The Assessing Officer and the ITAT, in their fairly detailed orders, have returned categorical findings to the following effect:-

(a) During the two years since the constitution of the firm M/s Nirmal Enterprises, the work in progress had increased

[13] 83 ITR 211

from Rs.1,04,53,500/- (initial contribution of the Appellant) to Rs.1,38,47,107/-;

(b) At the same time, the Appellant had drawn out a major portion of its contribution/investment in the firm. The Assessing Officer and the ITAT noted that within nine months of the transfer of the revalued plot of land to the firm, the Appellant had drawn 75% of its investment and in the second year the Appellant drew Rs.10,00,000/-, out of Rs.17,00,000/- standing in its capital account. By the end of the 3rd year i.e., 14 August 1986 the balance in the capital account was only Rs. 2,00,000/-;

(c) That on 28 February 1989, the Appellant retired from the firm, even though, the project for which the firm was constituted was not completed.

29. The Assessing Officer concluded, and the ITAT concurred, by giving its own reasons and independently assessing the material on record, that the Appellant had not only transferred the stock-in-trade at the market value but also withdrawn the profits arising therefrom, about which there was no full and frank disclosure. The events were so arranged that the Appellant enjoyed the benefits of these amounts without paying any tax on them.

30. The Assessing Officer and the ITAT recorded categorical findings of fact about how the very constitution of the firm and the transactions with it was a device or subterfuge to evade taxes. The Assessing Officer and ITAT have recorded

findings about the concealment of the crucial factor of withdrawal of amounts, including, in particular, the timelines of the withdrawals. The Assessing Officer and the ITAT have held that some reference in the capital account filed along with the return did not amount to a candid disclosure of all the material facts or the crucial facts of withdrawals and the timelines of such withdrawals. The ITAT held that the Appellant attempted to pass off the facts as similar to those in the case of *Hind Construction* (supra) by suppressing the vital distinction i.e., that the Appellant not only wrote up the value of the asset and brought the same into the firm M/s Nirmal Enterprises as its capital at an enhanced value but also withdrew the monies almost equal to the value of the asset within an extremely short span of time.

31. Though not required, we have also independently assessed the material on record. On such independent assessment, we find that the Assessing Officer and the ITAT were justified in recording the above findings. The Assessing Officer and the ITAT were also justified in reaching their inferences, based upon the findings of fact recorded by them. There is no perversity whatsoever in analysing and evaluating the material on record. The contentions now raised by Ms Vissanji before us have been duly considered by the ITAT, and we are not persuaded to take any different view.

32. Since the factual findings have attained finality, the issue is only about drawing inferences from such facts. From

the factual findings, we are satisfied that the very constitution of the firm and the transaction of the Appellant inflating the value of the plot of land and contributing it to the stock in trade, followed by withdrawals within a short period, amounted to a device or subterfuge or conduit to facilitate tax evasion. For these reasons, the Assessing Officer was justified in imposing the minimum prescribed penalty, and there is no warrant to interfere with the same.

33. The circumstance that the assessee had filed the capital account copy along with the returns does not amount to true or full disclosure in the present case. The entry in the capital account copy also, in the peculiar facts of the present case, does not amount to disclosure of the primary facts. The facts in *Culcutta Discount Co. Ltd* (supra), *Ananta Landmark Pvt Ltd* (supra) and *Mangalam Publications* (supra) are entirely different. They are not comparable to the facts in the present case. In none of those cases, the assessee adopted a device or subterfuge that could be remotely similar to the device or subterfuge adopted by the Appellant.

34. Besides, even if the disclosure issue is kept aside, the penalty was still liable to be imposed upon the Appellant for having adopted such a device or subterfuge to evade taxes. The primary facts about which there is no dispute, are sufficient to sustain the findings regarding the Appellant adopting a device or subterfuge to evade the taxes. These are

also good enough grounds to sustain the minimum penalty imposed upon the Appellant.

35. Further, if Explanation 1 to Section 147 was not strictly speaking applicable, still, Explanation 1 to Section 271 could not have been ignored. This was a case where the Explanation offered by the Appellant was found to be patently false. In any event, the Appellant failed to substantiate or demonstrate that such Explanation was bona fide. As noted earlier, the addition to the Appellant's income has already attained finality. Based on these factors, the minimum penalty imposed upon the Appellant warrants no interference.

36. The facts in the *Jamnalal Sons Ltd* (supra) case are also not similar in material respects to the Appellant's case. The Appellant's defence leaves too many questions unanswered and unexplained. This was a case where the asset was revalued substantially within a short period of its acquisition and development. This revalued asset was introduced in the firm, and within a short period, the Appellant withdrew a very substantial portion of its investment. The Appellant abruptly retired from the firm even before the project for which the firm was constituted could be completed. A false defence was raised regarding the withdrawals or the source from which such withdrawals were possible. There was hardly any increase in the firm's work in progress. None of these factors were involved in *Jamnalal Sons Ltd* (supra).

37. Besides, in *Jamnalal Sons Ltd* (supra), the Commissioner (Appeals), as well as the ITAT, had concurrently recorded a finding of fact that the partnership firm in which the assessee had invested was not a mere device or subterfuge to evade taxes. Such findings of fact were based on the material on record, and this Court, deciding an Appeal under Section 260A was not entitled to upset findings of fact unless perversity was demonstrated. Despite the notice, there was no appearance on behalf of the Revenue. Though this factor may not be relevant, what is relevant is that the Coordinate Bench, based on the material on record, found that there was no perversity in the concurrent findings of fact recorded by Commissioner of Income Tax (Appeals) and the ITAT. Therefore, based on *Jamnalal Sons Ltd* (supra), no case is made to interfere with the IATT's well-reasoned order.

38. The contentions based on *P K Kochammu Amma* (supra), *Muthiah Chettiar* (supra) *or Sohan Lal* (supra) also do not commend to us. As noted earlier, the mere filling of a capital account does not amount to full and proper disclosures in the present case. In any event, a penalty can be sustained on the finding that the Appellant had created a subterfuge to evade taxes legitimately due and payable by it. This is not a case where two views were reasonably possible, and therefore, the principle in *Durga Kamal Rice Mills* (supra) is not applicable. This is also not a case where a mere rejection of the Appellant's claim is the prime cause for imposing a

penalty. Therefore, the decision in *Reliance Petroproducts Pvt Ltd* (supra*)* is not applicable.

39. The following observations of the Hon'ble Supreme Court *Sunil Siddharthbhai* (supra) aptly apply in the present case:-

> "We have decided these appeals on the assumption that the partnership firm in question is a genuine firm and not the result of a sham or unreal transaction and that the transfer by the partner of his personal asset to partnership firm represents a genuine intention to contribute to the share capital of the firm for the purpose of carrying on the partnership business. If the transfer of the personal asset by the assessee to a partnership in which he is or becomes a partner is merely a device or ruse for converting the asset into money which would substantially remain available for his benefit without liability to income-tax on a capital gain, it will be open to the income-tax authorities to go behind the transaction and examine whether the transaction of creating the partnership is a genuine or a sham transaction and, even where the partnership is genuine, the transaction of transferring the personal asset to the partnership firm represents a real attempt to contribute to the share capital of the partnership firm for the purpose of carrying on the partnership business or is nothing but a device or ruse to convert the personal asset into money substantially for the benefit of the assessee while evading tax on a capital gain. The Income-tax Officer will be entitled to consider all the relevant indicia in this regard, whether the partnership is formed between the assessee and his wife and children or subnstantially limited to them, whether the personal asset is sold by the partnership firm soon after it is transferred by the assessee to it, whether the partnership firm has no substantial or real business or the record shows that there was no real need for the partnership firm for such capital contribution from the assessee. All these and other pertinent considerations may be taken into regard when the Income-tax Officer enters upon a scrutiny of the transaction, for, in the task of determining whether a transaction is a sham or illusory transaction or a device or ruse, he is entitled to penetrate the veil covering it and ascertain the truth."

40. For all the above reasons, we answer the substantial question of law against the Appellant (assessee) and in favour of the Respondent (Revenue). The Appeal is thus liable to be dismissed and is hereby dismissed. No costs.

(Jitendra Jain, J) **(M. S. Sonak, J)**