Commnr. Of Income Tax, Ahmedabad vs Sarabhai Holdings Pvt. Ltd on 21 October, 2008

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Bench: V.S. Sirpurkar, Lokeshwar Singh Panta

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"REPORTABLE"

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 482-483 OF 2003

Commissioner of Income Tax, Ahmedabad .... Appellant

Versus

Sarabhai Holdings Pvt. Ltd. .... Respondent

JUDGMENT

V.S. SIRPURKAR, J.

1. This Judgment will dispose of two Appeals, they being Civil Appeal Nos. 482 of 2003 and 483 of 2003. These Appeals are filed by the Commissioner of Income Tax, Ahmedabad (hereinafter referred to as "Revenue"). In both the Appeals, the Revenue challenges the common judgment passed by the Gujarat High Court, wherein, the High Court was considering Income Tax Reference (ITR) Nos. 56 of 1986, 58 of 1993, 220 of 1995 and 75 of 1987. These References were made out of the order of Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal").

2. It is agreed before us that presently we would be concerned only with two References, they being Reference No. 56 of 1986 and Reference No. 220 of 1995. Insofar as Reference No. 75 of 1987 is concerned, though the High Court had answered in favour of Revenue and against the assessee, the assessee did not file any appeal and, therefore, that part of the High Court Judgment dealing with Income Tax Reference No. 75 of 1987 becomes final. The learned Counsel for the assessee very fairly agreed with the same. As regards the Income Tax Reference No. 58 of 1993, the Revenue had filed an appeal against the impugned judgment dealing with the same, however, this Court had dismissed the appeal filed by the Revenue on the grounds of limitation. The learned Senior Counsel Mr. P.V.

Shetty, appearing on behalf of the Revenue very fairly admitted this position. We are, therefore, left with only two References, which are as under:-

> Income Tax Reference No. 56 of 1986 (which emanated from the quantum proceedings in respect of the Assessment Years 1979-80 and 1980-81):-
>
> For the Assessment year 1979-80 - at the instance of the assessee:-
>
> (i) Whether on facts and in the circumstances of the case, the Tribunal was right in law in holding that the interest of Rs.66,29,236/- being the amount of interest as determined by the Income Tax Officer on a notional basis from 1.7.1977 to 30.6.1978 was liable to tax on accrual basis for the Assessment Year 1979-80?
>
> (ii) Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the interest accrued from day-to-day as a result of supplementary agreement and as such, the same was eligible to tax as income for Assessment Year 1979-80?
>
> (iii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that giving up of interest on the ground of commercial expediency was not justified as no direct or indirect benefit had accrued to the assessee?

For the Assessment Year 1980-81 - at the instance of the Revenue:-

(i) Whether the Appellate Tribunal has not erred in law and on facts in holding that no income could be said to be accrued to the assessee as the interest would start accruing from 1.7.1979, i.e., after the end of the accounting year?

(ii) Whether the finding of the Tribunal that the interest could not be said to be accrued to the assessee during the accounting period in question and hence, question of relinquishment of any right does not arise is correct in law?

Income Tax Reference No. 220 of 1995:-

Income Tax Reference No. 220 of 1995 was filed at the instance of the assessee in respect of the penalty levied under Section 273 (2)

(a) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and the Reference was worded as under:-

> "Whether on facts and in the circumstances of the case, the Tribunal was justified in law in confirming the penalty of Rs. 4 lakhs levied under Section 273 (2)(a) of the Act?"

3. Before we go further, it must be clarified that insofar as Assessment Year 1979-80 is concerned, the High Court answered the Reference No. 56 of 1986 in favour of the Revenue, while insofar as Assessment Year 1980-81 is concerned, the High Court answered it in favour of the assessee and against the Revenue. The assessee has not challenged the judgment of the High Court insofar as Assessment Year 1979-80 is concerned, therefore, we need not consider that part of the High Court judgment, though we might be required to incidentally refer to the same. Thus, we are left with Reference No. 56 of 1986 insofar as it pertains to Assessment Year 1980-81 and the Reference No. 220 of 1995. We must again clarify that though in Reference No. 220 of 1995, the High Court found against the assessee in respect of Assessment Year 1979-80, the penalty, however, of Rs.4 lakhs was set aside. We are, therefore, concerned in Reference No. 220 of 1995, only with Assessment Year 1979-80.

4. Following factual panorama would have to be considered for properly considering the background.

5. The assessee herein indisputably, follows the Mercantile System of Accounting.

6. For Assessment Year 1979-80, the Accounting Year is 1.7.1977 to 30.6.1978, while for the Assessment Year 1980-81, the Accounting Year is 1.7.1978 to 30.6.1979.

7. The assessee, which was previously known as Sarabhai Chemicals Pvt. Ltd. has now become Sarabhai Holdings Pvt. Ltd. They would be referred to as "assessee" for short.

8. There was an agreement on 28.2.1977, whereby, the assessee agreed to transfer its industrial undertaking and business activity known as Sarabhai Common Services Division, which was its unit. This was to take place with effect from 1.3.1977. The unit was sold as going concern in favour of assessee's own subsidiary M/s. Elscope Pvt. Ltd. for a total consideration of Rs.11,44,10,253/-.

9. Under this agreement, the amount of Rs.49 lakhs was to be paid by way of deposit/earnest money and Rs.4.41 crores was to be set off against the due amount from the respondent-assessee to M/s. Elscope Pvt. Ltd. as consideration for equity shares in Elscope held by the respondent- assessee. The balance sale consideration (approx. Rs.6.55 crores) was to be paid in eight equal annual installments, starting with 1.10.1979. Such installment was to become payable on the 1st of October each year.

10. A further agreement was entered into between the assessee and Elscope on 4.3.1977. This agreement provided for an interest clause, which was agreed at the rate of 11% per annum and that it would be payable on balance sale consideration which would remain unpaid from time to time. In short, the earlier agreement dt. 28.2.1977 was varied/altered. The interest clause was as under:-

> "The purchaser shall pay simple interest at the rate of 11% per annum on the balance of the unpaid purchase consideration remaining outstanding from time to time and, if the purchaser commits any default or delay in paying any installment or installments on the due date, the purchaser shall pay interest at such rate as is equal

> to the rate of interest which the vendor pays to its bankers in the ordinary course or business from the due date of payment of installment until the date of payment thereof."

There were some other changes made in the payment terms. However, it is again admitted that the amount covered by the installments was going to be Rs.4.54 crores approximately.

11. It may be incidentally mentioned here that Elscope, in turn, transferred this industrial undertaking, purchased by it to its subsidiary Ambalal Sarabhai Enterprises Ltd. on 25.4.1978 vide the Assignment Deed of the even date. On 15.6.1978, Elscope wrote to the respondent- assessee proposing modification in terms of payment and requested, inter alia, that the interest be charged on deferred sale consideration from 1.7.1979 instead of 1.3.1977. It was proposed by this letter, firstly, Rs.1.84 crores (approx.) will be payable as and when demanded by the respondent-assessee and will not carry any interest and secondly, Rs.4.7 crores will be payable in 5 annual installments, the first installment becoming payable on 1.3.1987 and the said amount shall carry simple interest at the rate of 11% per annum with effect from 1.7.1979. The Elscope also offered to secure the amount of 4.7 crores to the satisfaction of the respondent-assessee.

12. On 30.6.1978, the proposal sent by Elscope vide letter dt. 15.6.1978 was decided to be accepted by the assessee and a Resolution to that effect was passed in the meeting of the Board of Directors. The said Resolution is on record and the relevant portion reads as under:-

> "....the Company doth hereby approve, accept and adopt the following revised mode of payment as contained in letter No. ELSCOPE/MC dt. 15th June, 1978 received from Elscope Pvt. Ltd."

It must be noted here that firstly, in keeping with its proposal, Elscope furnished to the respondent-assessee secured bonds of Ambalal Sarabhai Enterprises Ltd. Secondly, it must be noted that as proposed in the letter dt. 15.6.1978, the interest was to start from 1.7.1979. While, before this interest was to start, the Resolution dt. 30.6.1978 was passed, doing away with the requirement of payment of interest in terms of the earlier agreement dt. 4.3.1977. So far so good.

13. The assessee received a notice under Section 210 of the Act on 17.10.1978, requiring it to pay the advance tax of Rs.1,22,22,757/-, while the second notice was served on 8.12.1978, asking the respondent- assessee to pay the advance tax of Rs.1,28,74,172/-.

14. On 14.12.1978, however, the respondent-assessee filed an estimate, showing NIL amount of advance tax payable for the Assessment Year 1979-80. It further filed the returns on 29.6.1979, declaring the total income of Rs.772/- for the Assessment Year 1979-80. Insofar as the Assessment Year 1980-81 is concerned, the assessee filed the returns on 27.6.1980, declaring a loss of Rs.17,345/-. The Assessing Officer passed an assessment order dt. 20.9.1982, determining the total income to be Rs.68,99,202/-, which included the amount of interest accrued on deferred sale consideration, receivable from Elscope. The Assessing Officer also levied interest under Section 215 of the Act on a finding that the assessee had failed to pay advance tax. The Assessing Officer also

directed that the penalty proceedings under Section 273(2)(a) and 271(1)(c) of the Act should be initiated against the assessee.

15. Insofar as Assessment Year 1980-81 was concerned, an addition of income by way of interest on the deferred sale consideration was taken into account and the amount of Rs.55 lakhs (approximately) was added to the taxable income of the assessee.

16. Two separate appeals came to be filed at the instance of the assessee before Commissioner of Income Tax (Appeals) [CIT (Appeals)] in relation to the Assessment Years 1979-80 and 1980-81. The CIT(Appeals) upheld the assessment orders in both the Assessment Years and also confirmed the addition of interest amount to the income of the assessee. The Appellate Authority refused to accept the plea of the assessee regarding the waiver of interest by the Resolution dt. 30.6.1978. Two appeals came to be filed before the Tribunal, they being ITA No. 1137/Ahd/84 concerning the Assessment Year 1979-80 and ITA No. 1138/Ahd/84 concerning the Assessment Year 1980-81 respectively.

17. The appeals were heard together and disposed of by a common order dated 15.2.1985. Insofar as Assessment Year 1979-80 is concerned, the Tribunal held that the interest had already accrued vide further agreement dt. 4.3.1977 and as such, the Resolution dt. 30.6.1978 was of no consequence, as there was no commercial expediency for making it retrospectively operative. However, it accepted the plea as regards the interest under Section 215 of the Act. The Tribunal viewed the question involved to be a highly complex issue and held that the mere fact that the decision had gone against the assessee could not be viewed as being determinative of the assessee's liability to pay advance tax. The Tribunal relied on Gujarat High Court Judgment for that purpose.

18. However, insofar as the Assessment Year 1980-81 is concerned, the Tribunal held that the amount of interest could not be included in income of assessee, since the Resolution dt. 30.6.1978 was passed prior to the commencement of the relevant Accounting Year, which was 1.7.1978 to 30.6.1979 and, therefore, it could not be said that the interest income had acrrued.

19. The Tribunal also held that it was permissible for the parties to alter the agreement regarding the charging of interest in the wake of the fact that the said Resolution was found to be a genuine Resolution. The Tribunal came to the finding that the interest could not have accrued insofar as Assessment Year 1980-81 was concerned.

20. However, in 1988, the show Cause Notice came to be issued under Section 274 read with Section 273 (2)(a) of the Act as to why the penalty should not be levied for furnishing an untrue estimate of advance tax. Replies were given to this Notice. However, by order dt. 9.8.1988, the Assessing Officer imposed a penalty of Rs.4 lakhs upon the respondent- assessee under Section 273(2)(a) of the Act for knowingly furnishing wrong estimate of advance tax on 14.12.1978, which it had reason to believe to be untrue. An appeal came to be filed being Appeal No. CAB/IV-14/88-89, which appeal was dismissed by the CIT (Appeals), which confirmed the levy of Rs.4 lakhs as penalty. This order was challenged by way of an appeal before the Tribunal being ITA No. 2572/Ahd/1989. That appeal also came to be dismissed by the order of Tribunal. However, as stated earlier, four References came

to be filed before the High Court of Gujarat, arising from various orders of Tribunal with respect to the respondent- assessee for the Assessment Year 1979-80. In the earlier part of the judgment, we have already shown that there will be no question of considering the part of Reference No. 56 of 1986 relating to the Assessment Year 1979-80 and Reference No. 75 of 1987, which was at the instance of the Revenue, as also the Reference No. 58 of 1993 for the reasons stated earlier. The High Court heard four References together and delivered a common judgment dt. 6.2.2002. In Income Tax Reference No. 56 of 1986, insofar as it pertains to Assessment Year 1979-80, the High Court held in favour of Revenue and since there is no appeal by the assessee, we need not go into that aspect. Insofar as the said Reference pertains to Assessment Year 1980-81, the High Court held in favour of the assessee and against Revenue, which finding is in challenge by the Revenue. Insofar as Income Tax Reference No. 75 of 1987 is concerned, that pertains to the levy of interest under Section 215 of the Act for the Assessment Year 1979-80, the High Court held in favour of Revenue. Again, we need not go into that question in this appeal. So also in Income Tax Reference No. 58 of 1993, the finding of the High Court was in favour of the assessee, whereby, the High Court did away with the penalty under Section 271(1)(c) of the Act for the Assessment Year 1979-80, the appeal against which is, dismissed by this Court on the ground of limitation on 4.10.2004 in SLP(C) No. CC 8632 of 2004. Therefore, even that need not deter us. The only remaining issue was in Income Tax Reference No. 220 of 1995, wherein, the High Court held that though the finding was against the assessee for the Assessment Year 1979-80, still there would be no penalty under Section 273(2)(a) of the Act, was not justified. We would have to deal with that issue in this appeal.

21. The Learned Senior Counsel, appearing on behalf of the Revenue very painstakingly, took us through all the findings of the High Court, as well as the Tribunal and urged that both the Tribunal as well as the High Court had erred in holding that there was no accrual of interest insofar as the Assessment Year 1980-81 was concerned. The learned Senior Counsel invited our attention to the basic agreement of transfer dt. 28.2.1977, as also to the subsequent agreement dt. 4.3.1977. We were also taken through the letter dt. 15.6.1978, as also the Resolution dt. 30.6.1978 and on that basis, the Ld. Senior Counsel urged that this was nothing, but an attempt on the part of the assessee to avoid payment of tax on the interest which it was bound to pay. The learned Senior Counsel urged that considering the whole transaction and the relations between the assessee Company and the transferee Company, the assessee Company tried to wriggle out the liability to pay the tax. The ld. Senior Counsel also urged that ordinarily the assessee Company could not be expected to defer the interest as it did vide Resolution dt. 30.6.1978. The Learned Senior Counsel, therefore, urged that the High Court erred in confirming the order of the Tribunal, insofar as the tax liability pertaining to the Assessment Year 1980-81 is concerned. The Learned Senior Counsel, secondly, argued that at any rate, the Tribunal and the High Court had erred in absolving the assessee of the penalty, when it was clear that the assessee had failed to furnish the true returns and also failed to pay the due advance tax.

22. As against this, Shri E.R. Kumar, learned counsel for the assessee, assisted by Shri Sameer Parekh and Ms. Rukhmini Bobde, Advocates supported the judgment of the High Court and urged that the finding in respect of the Assessment Year 1980-81 was correct finding, as in commercial transaction, the parties were free to negotiate to vary the terms of the commercial transactions. The learned counsel pointed out that the Resolution dt. 30.6.1978 was indisputably a genuine Resolution

and though the said Resolution could not wipe out the interest already accrued for the Assessment Year 1979-80, it could defer the future liability of interest in the manner it did. The learned Counsel, therefore, supported the impugned judgment. It was further urged that once it was held that the assessee was justified in acting on the basis of the Resolution dt. 30.6.1978 and once it was held that there would be no liability on account of the interest as the interest had been accrued after that date, there would be no question of proceeding under the penalty provisions of Section 273 (2)(a) and 271(1)(c) of the Act. The learned Counsel also supported the finding of the Tribunal as confirmed by the High Court in respect of the penalty under Section 271(1)(c) of the Act, being waived and pointed out that the reasons given by the Tribunal and the High Court were absolutely justified.

23. We cannot understand the criticism of learned Senior Counsel appearing on behalf of the Revenue that by Resolution dt. 30.6.1978, the assessee was avoiding the payment of tax on the interest which had accrued. The genuine nature of the Resolution was not and could not be disputed. When we see the letter dt. 15.6.1978 and also note that the letter was complied with by Elscope in providing adequate security of the payable amounts, there is nothing to dispute or suspect the genuineness of the transaction. The whole transaction would have to be viewed on that backdrop. In the commercial world, the parties are always free to vary the terms of contract. Merely because by Resolution dt. 30.6.1978, the assessee agreed to defer the payment of interest, would not mean that it tried to evade the tax. What is material in the tax jurisprudence is the evasion of the tax, not the beneficial lawful adjustment therefor. Considering the genuine nature of the transaction based on the letter dt. 15.6.1978 and the Resolution dt. 30.6.1978, it cannot be said that the whole transaction was in order to evade the tax.

24. There is also no dispute that the assessee was following the Mercantile System of Accounting and that the Accounting Year for the Assessment Year 1980-81 was 1.7.1978 to 30.6.1979. The High Court has correctly held and confirmed the Tribunal's finding that insofar as the accrued interest for the Assessment Year 1979-80 was concerned, since the interest had already accrued to the assessee, it cannot be wiped out later on by passing a Resolution dt. 30.6.1978. The interest, indeed had accrued in the Accounting Year which began from 1.7.1977 to 30.6.1978 and as such, the subsequent passing of the Resolution could not result into wiping out that accrual. The assessee could not have refused to pay tax on that. We are indeed not concerned with Assessment Year 1979-80, but insofar as the Assessment Year 1980-81 is concerned, the interest had not accrued and before it accrued, the assessee deferred the same by passing Resolution dt. 30.6.1978. Thus, there was a full scope to the assessee to adjust the interest or as the case may be to defer the same which it did. We, therefore, do not find any ill-intention on the part of the assessee to evade the tax.

25. At this juncture, we cannot forget that the assessment for the Assessment Year 1980-81 was finalized by the Tribunal by holding that the interest could not be included. We, therefore, fail to follow, as to how, the said interest could be treated as an income, so as to compel the assessee to pay advance tax on the same. We, therefore, do not see any justification for a Show Cause Notice under Section 274 read with Section 273 (2)(a) of the Act on the ground that the assessee had deliberately filed an untrue estimate of the advance tax which he had known or reason to believe to be untrue. In our opinion, the Tribunal as well as the High Court were right in holding the transaction to be genuine.

26. We agree with the High Court's finding that the law permits the contracting parties to lawfully change their stipulations by mutual agreement and, therefore, the assessee and the vendee had no legal impediment in modifying the terms of their contract. We also agree with the further finding of the High Court that the Resolution could not be given any retrospective effect so as to facilitate evasion of tax liability that had already arisen for the Assessment Year 1979-80. We further agree with the High Court's finding that it being a valid stipulation, changed the mode of payment from the date of the Resolution and, therefore, under the changed mode of payment adopted under the Resolution dt. 30.6.1978, no interest was to accrue during the Accounting period from 1.7.1978 up to 30.6.1979 and, therefore, the reasoning of the Tribunal on that count appeared to be correct as regards the Assessment Year 1980-81 is concerned. We further confirm the finding that since no interest had accrued in the Accounting Year 1.7.1978 to 30.6.1979, there could arise no question of relinquishment of interest for any commercial expediency. There was no such question because a party cannot relinquish income that has not accrued at all. We, therefore, accept the judgment of the High Court insofar as it pertains to the Reference No. 56 of 1986. The High Court has correctly found that in view of the categorical stipulation that interest will be payable on the deferred consideration amount in respect of the sale, which became effective from 1.3.1977, the interest started accruing on that time basis, from 1.3.1977 determined by the amount outstanding from time to time and the rate applicable which both were stipulated in clearest possible terms in the Deed of Assignment dt. 28.6.1977 and the agreements which preceded it. The High Court has assessed the facts correctly and has further observed in para 14.7 that what already accrued during the Accounting Year 1.7.1977 to 30.6.1978 could not be nullified by the Resolution dt. 30.6.1978, however, the same rule could not be applicable to the subsequent Accounting Year, when the interest had not accrued. We, therefore, confirm the finding of the High Court insofar as Reference No. 56 of 1986 is concerned and hold that the High Court had correctly decided the Reference No. 56 of 1986 insofar as it pertains to Assessment Year 1980-81.

24. This takes us to the finding of the High Court insofar as the Reference No. 220 of 1995 is concerned. In this case, the authorities below and the Tribunal had held that while filing the Nil estimate of advance tax on 14.12.1978, the appellant had full knowledge of the interest income of Rs.66,29,236/- which had accrued and though all this was known to the assessee, he had filed the Nil estimate knowingly or it had reason to believe that the Nil estimate was untrue. The High Court while dealing with the issue, took the view that the burden was on Revenue to establish under Section 273 (2)(a) of the Act that the assessee, when it filed the Nil estimate, knew or had reason to believe that it was not genuine and was spurious. The High Court, however, took the view that the Resolution dt. 30.6.1978 was not doubted by the authorities to be spurious and under that Resolution, the date of accrual of interest was shifted to 1.7.1979 by substituting the mode of payment as was incorporated in the agreement and the Deed of Assignment. It was pointed out by the High Court further that the Nil estimate, was filed on 14.12.1978, i.e., much after the said Resolution was passed. The High Court, therefore, took the view that in the background of the said Resolution, by which the assessee intended to shift the accrual of interest to 1.7.1979, it is difficult to accept that the assessee had reason to believe that the Nil estimate was untrue. The High Court further holds the possibility that the assessee reasonably believed that in view of the Resolution dt. 30.6.1978, it could legitimately file the Nil estimate, cannot be ruled out. Further, in view of the nature of the change in stipulation of mode of payment made by Resolution dt. 30.6.1978, no

definite conclusion can be drawn that the assessee had reason to believe that the Nil estimate filed was untrue. Merely because on assessment, the assessee's stand that the Resolution which was passed on the last day of its Accounting Year, i.e., on 30.6.1978, was not accepted on the ground that the interest that had already accrued during the Accounting Year on the strength of the contractual terms, cannot be made `not to accrue after its actual accrual, it cannot be inferred with any certainty that the assessee had reason to believe that its Nil estimate was untrue'. The High Court has then held that the penalty under Section 273 (2)(a) of the Act is not an automatic outcome of the addition of such income. It is on this ground that the High Court has set aside the finding of the Tribunal confirming the penalty of Rs.4 lakhs levied under Section 273 (2)(a) of the Act on the assessee.

25. We must clarify here that insofar as Assessment Year 1980-81 is concerned, there will be no question of any penalty whatsoever and it had to go as it has been found on facts and law that the Resolution dt. 30.6.1978 had become effective and under the same, the interest was already deferred and, therefore, there was no accrual of interest in that year. However, the question is as to whether the High Court was right in absolving the assessee of the penalty, which was inflicted even for the year 1979-80. The learned Senior Counsel, appearing on behalf of Revenue very earnestly argued that once the interest was found to have been accrued for the Assessment Year 1979-80 and once on that count, the income of the assessee was held to be Rs.66,29,236/-, then the penalty under Section 273(2)(a) of the Act was a natural consequence and that the High Court should not have put a specific burden on Revenue to prove that the estimate of advance tax payable by it was not only untrue, but the assessee also knew and had reason to believe it to be untrue.

26. We do not agree, considering the specific language of the Section squarely. The Section runs as under:

> "273(2) If the Assessing Officer, in the course of any proceedings in connection with the regular assessment for the assessment year commencing on the 1st day of April, 1970, or any subsequent assessment year, is satisfied that any assessee- (a) has furnished under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5) of Section 209A, or under sub-section (1) or sub-section (2) of Section 212, an estimate of the advance tax payable by him which he knew or had reason to believe to be untrue."

(b).....

(c)....." The specific wording would signify that there has to be a satisfaction of the Assessing Officer that the estimate of advance tax furnished by the assessee was not only untrue, but the assessee also knew or had reason to believe the same to be untrue. In the present case, there can be no dispute that the claim of the assessee in respect of the Assessment Year 1979-80 was not accepted. However, in our opinion, in the peculiar facts of this case, it cannot be said that the assessee had knowledge of its estimate of advance tax to be untrue or had reason to believe the same to be untrue. The assessee had, undoubtedly, claimed the waiving of that interest as a natural corollary of the Resolution dt. 30.6.1978. It was also claimed that the assessee had commercial expediency for doing the same. It was tried to show that such commercial

expediency arose by the subsequent agreement, whereby, the Elscope had agreed to provide the security for the amount due from it. Assessee had, therefore, furnished its estimate for the advance tax as Nil, as it claimed that it had the income of only about Rs.800/-. In the subsequent year, the assessee claimed the loss of about Rs.17,000/-. Though the attempt on the part of the assessee was to give up the accrued interest in the name of commercial expediency, there was no valid justification to relinquish the same, as has been found by the High Court. The High Court has also specifically found that the only aim was to avoid payment of tax which had become due on the basis of the accrual of interest and commercial expediency was only a dignified guard in which the arrangement made to evade the tax was sought to be covered. However, it was shown to the High Court that the penalties levied under Section 273(2)(a) of the Act were determined in case of two companies of the same Group, they being, Fabriquip Pvt. Ltd. and Packart Pvt. Ltd., wherein, it was held that the Resolution passed on 30.06.1978 for the foregoing interest had become applicable from 1.7.1978. The High Court took the view that the levy of interest under Section 215 of the Act and the levy of penalty under Section 273(2)(a) of the Act stand on different footings. We have no hesitation to accept this view of the High Court. Indeed, while the levy of interest under Section 215 of the Act is automatic, that is not the case with the penalty under Section 273(2)(a) of the Act, where the mensrea on the part of the assessee would have to be shown to the extent, it has been indicated in the language of the Section, where, therefore, there was some scope for the assessee to justify the estimate given by it and that the penalty could not be inflicted. Indeed, if the assessee in this case proceeded on the basis of Resolution dt. 30.6.1978, it has to be held that the assessee had reasonably believed that the income of interest which was written off by the Resolution, could not be added to its income. If it genuinely proceeded under that bonafide impression, then in our opinion, the High Court was right in writing off the penalty and upsetting the view of the Tribunal. We accept the finding of the High Court, which is in the following words:

> "....no definite conclusion can be drawn that the assesse had reason to belive that the Nil estimate filed by it was untrue....."

26. Considering the overall facts in this case, we are of the clear opinion that the High Court was right in setting aside the penalty of Rs.4 lakhs inflicted against the assessee under Section 273(2)(a) of the Act. We answer the issue accordingly. In the result, the appeals filed by the Revenue fail and the judgment of the High Court is confirmed without any costs.

.....J. (Lokeshwar Singh Panta) .....J. (V.S. Sirpurkar) New Delhi;

October 21, 2008