

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 4292 OF 2000

COMMISSIONER OF INCOME TAX, UDAIPUR

Appellant (s)

VERSUS

M/S. VAISHALI ENTERPRISES

Respondent(s)

(With office report)

Date: 29/09/2005 This Appeal was called on for hearing today.

CORAM :

HON'BLE MRS. JUSTICE RUMA PAL

HON'BLE MR. JUSTICE S.H. KAPADIA

For Appellant(s)

Mr. Harish Chandra, Sr. Adv.

Mr. B.V. Balaram Das, Adv.

For Respondent(s)

UPON hearing counsel the Court made the following

O R D E R

The appeal is allowed.

[SUMAN WADHWA]

[MADHU SAXENA]

COURT MASTER

COURT MASTER

Signed order is placed on the file.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 4292 OF 2000

Commnr. of Income Tax,
Udaipur .. Appellant

vs.

M/s. Vaishali Enterprises .. Respondent

O R D E R

The respondent-assessee in this case was a wholesale dealer of cigarettes manufactured by M/s. Godfrey Philips India Ltd. (GPIL). In 1986, searches were conducted in the business and residential premises of the respondent and its partners. In the course of the search, it was found that the assessee had been charging "on money" upon the sale of cigarettes supplied to it by GPIL. The amounts were introduced in the books of accounts of the respondent in the form of credits under various names. The Assessing Officer found that the assessee did not explain or establish any of these items of so-called credit. After giving notice to the respondent the Assessing Officer imposed a penalty under Sec.271 (1) (C) of the Income Tax Act 1961 amounting to Rs.5,26,585/-.

The respondent preferred an appeal before the Commissioner of Income Tax (Appeals) before whom the

the form of an affidavit affirmed by Shri Shewa Ram. Shri Shewa Ram was looking after the business of the sister concern of the respondent. The sister concern's name had also appeared against the so-called items of credit. The Commissioner did not permit the evidence to be brought on record because of the non-fulfilment of the provisions of Rule 46A to the Income Tax Rules. It was found in the circumstances that the respondent firm had been receiving "on money" or premium on the sale of cigarettes and it was not able to establish the various transactions recorded by way of cash receipts which, though recorded in a diary, were not recorded in the regular books of accounts. The Commissioner, accordingly, found that penalty was leviable under Sec.271 (1)(C) but granted slight modification relating the quantum of penalty.

The matter was then taken up before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal noted that the affidavit of Shri Shewa Ram should have been taken on record without in fact discussing whether the provisions of the Rule 46A had been complied with nor was there any express order admitting the affidavit.

The Tribunal noted that in another case M/s. GPIL had admitted that it had received "on money" from its wholesale dealers. It had then approached the Settlement Commissioner and surrendered a huge

amount for settlement of all the cases. As to whether these proceedings would cover the case in respect of

the present respondent is not clear.

However, the Tribunal set aside the order of penalty after affirming that the respondent assessee had in fact charged "on money":-

"Since the on money was held to be charged at the instance of principal company, we hold that it was business compulsion of the assessee."

Accordingly, the penalty order was reversed.

The Department has challenged the order of the ITAT before us in appeal.

None appears on behalf of the respondent despite service.

We are of the view that the decision of the Tribunal cannot be sustained. As we have already said, the Tribunal appears to have acted on the affidavit of Shri Shewa Ram without complying with the provisions of Rule 46A. Besides merely because "on money" was realized by the respondent assessee on account of any compulsion by the GPIL would not serve to exonerate the respondent from penal action under Sec.271 (1)(C). We, therefore, allow the appeal and set aside the decision of the ITAT and confirm the order of the Commissioner of Income Tax (Appeals).

.....J.
(RUMA PAL)

.....J.
(S.H. KAPADIA)

New Delhi;
September 29, 2005.