

(5392)

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.10.2012

CORAM:

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

and

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Tax Case (Appeal) No.1985 of 2006

The Commissioner of Income Tax

Nungambakkam

Chennai-600 034.

.. Appellant

versus

M/s.Balaji Distilleries Ltd.

9, Bazullah Road, T.Nagar

Chennai-600 017.

.. Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Appellate Tribunal Madras 'A' Bench, Chennai, dated 27.07.2005 passed in I.T.A.557/(Mds)/1999.

For appellant

: Mr.T.Ravikumar

Standing Counsel for Income Tax

For respondent

: Dr.Anita Sumanth

JUDGMENT

(Judgment of the Court was delivered by CHITRA VENKATARAMAN,J.)

The Revenue is on appeal as against the order of the Income Tax Appellate Tribunal in respect the assessment year 1991-92, raising the following substantial questions of law:

(i) Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in law in deleting penalty levied under Section 271(1)(c) of the Income Tax Act for the assessment year 1991-92? and

(ii) Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in not considering the applicability of the explanation to Section 271(1)(c) of the Act, which clearly warrants levy of penalty?

2. The facts of the case herein show that in the quantum appeal filed by the assessee, the Tribunal confirmed the addition under Section 461 as under:

1) Inland Flight charges : Rs. 2,00,000/-

2) Addition on the ground that no

goods have been received : Rs. 3,70,231/-

3. Addition of difference in rate of

Purchase : Rs. 10,38,767/-

4. Excess provision made towards

sales tax, added u/s. 43B : Rs. 18,69,787/-

Rs. 34,78,785/-

The Tribunal's order dated 21.08.1995 had not been further challenged by the assessee or by the Revenue and hence, the said order had attained finality. As a fallout of the order in the assessment proceedings, the Assessing Authority invoked penalty proceedings under Section 271(1)(c), calling upon the assessee to explain as to why penalty should not be levied for the concealment of income. As far as inland flight charges of Rs.2,00,000/- is concerned, the assessee claimed that the addition was sustained by the Tribunal only on the ground that there was no connecting document and the fact of expenditure or the genuineness or the business purpose of expenditure was not questioned, nor was the explanation found as incorrect. The assessee company further stated that due to efflux of time, they could not offer the details with regard to the expenditure. Hence, penalty could not be levied.

3. As regards the inflation in purchases, the assessee pointed out that the suppliers M/s.Royal Glass, Bangalore and M/s.Syndicate Bottle Suppliers, Pondicherry were existing firms and the Tribunal, having found the existence of these two suppliers, found that the assessee had not maintained the accounts as regards the bottles sent to the factory. Thus it merely made an addition to the extent of 25%.

4. As regards the inflation on the purchases and the addition made because of differences in the rates of purchases, the assessee contended that the expenditure incurred on business purposes was not questioned. The addition made on account of the difference in the rate of purchase on estimated basis would not attract penalty under Section 271(1)(c).

5. As regards the addition made under Section 43B was concerned, the Tribunal pointed out that the same was reflected in the accounts and that the Tribunal did not reject the assessee's contention on this. The Assessing Officer, however, pointed out that the non-production of accounts at the time of inspection amounted to suppression of information. As regards the estimation made by the Tribunal, the Officer pointed out that the order of the Tribunal pointed out to the basic fact about the non-receipt of goods by the assessee company. The inflation in prices resulted in the reduction of income liable for assessment. Consequently, he found that the assessee had falsified its account and had furnished inaccurate particulars, attracting penal proceedings under Section 271(1)(c) of the Income Tax Act.

6. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals). As far as the first head of expenditure on inland flight charges is concerned, after the Income Tax Appellate Tribunal's order in the quantum appeal, the assessee produced before the Commissioner, the bank accounts reflecting the encashment of the cheque and the certificate from the Airports Authority of India, that the landing charges and packing charges were collected from private aircraft.

Based on this, the Commissioner of Income Tax (Appeals) held that the addition made on this head in the assessment proceedings, per se, would not call for levy of penalty under Section 271(1)(c) of the Income Tax Act. As regards the inflation in price and on the ground that no goods were received, the Commissioner pointed out to the order of the Tribunal holding that the bottles were very much in existence. The Commissioner pointed out to the reasoning of the Tribunal that even if the discrepancy was found, it could not be held that there was no supply of bottles. In the circumstances, pointing out that the assessee had not maintained the stock account on this, the Tribunal confirmed the estimate on the entire consumption of bottles. The Commissioner of Income Tax (Appeals) held that the mere disbelief of the explanation would not attract concealment penalty. As regards the allegation on the inflated purchase price of bottles, the Tribunal fixed it at Rs.1.25 per bottle and that inflation in the rate of bottles could not be inferred merely with reference to the comparable cases cited by the Assessing Officer and there was nothing on record to show that the type of bottles purchased by the assessee and other parties were the same. The Commissioner of Income Tax (Appeals) further referred to the finding as regards the existence of the two firms from whom the bottles were purchased.

7. As regards Section 43B disallowance on the excess provision made towards sales tax and related taxes, the Tribunal pointed out that while filing the return, the assessee had omitted to include a sum of Rs.18,69,787/-, which related to the details of outstanding sales tax liability and the return filed was based on the tax audit report. It further pointed out that even though the details were available in the balance sheet, the omission was inadvertent.

8. From the above facts, the Commissioner came to the conclusion that the assessee had no intention of misguiding the Assessing Officer with regard to the factum of payment and the only mistake was not to add the amount in computing the taxable income. In the circumstances, the Commissioner of Income Tax (Appeals) allowed the appeal that there was no ground for levying penalty.

9. Aggrieved by this, the Revenue went on appeal before the Tribunal. Extracting the finding recorded in its order passed earlier in the quantum appeal in I.T.A.No.37 of 1995 dated 31.08.1995, the Tribunal held that it sustained 25% of the addition, taking note of the fact about the existence of the two firms and accepting the explanation offered by the assessee.

10. As regards the bottles sent for trial run without entering into the stock register, the Tribunal, in the quantum appeal, pointed out that only 2% of the entire consumption of the bottles could be taken as not having been entered in the books of accounts. Thus, it sustained 25% of the addition. Based on the findings as regards the other additions and the circumstances under which the additions were sustained therein, the Tribunal herein came to the conclusion in paragraph 3 that there was no mala fide intention or consciousness to misguide the Assessing Officer in submitting wrong particulars. Agreeing with the finding of the Commissioner of Income Tax (Appeals) that the assessee had no intention to misguide the Assessing Officer with regard to the claim, the Tribunal held that there was no ground for levying penalty and thus confirmed the order of the Commissioner of Income Tax (Appeals). Aggrieved by this, the present appeal has been filed by the Revenue.

11. Learned Standing Counsel appearing for the Revenue submitted that in so far as the inland flight charges are concerned, it is no doubt true that the assessee had substantiated its claim by placing further evidence before the Commissioner of Income Tax (Appeals). However, as regards the addition made on account of inflation in purchases as well as as regards Section 43B disallowance, the Tribunal itself had sustained the addition of 25% and for levying penalty under Section 271(1)(c), there is no necessity for considering the case of mens rea. Referring to the decision reported in [2001] 251 ITR 99 (M/s.K.P.Madhusudhanan Vs. Commissioner of Income Tax, Cochin), learned Standing Counsel appearing for the Revenue submitted that the Tribunal misdirected itself in cancelling the penalty.

12. Learned Standing Counsel placed before us the unreported decision of the Apex Court in T.C.No.6922 of 2012 dated 25th September 2012, wherein the Apex Court cancelled the levy of penalty under Section 271(1)(c) in a case, where, while submitting the return, the assessee failed to add the provision for gratuity to its total income. As far as the present case is concerned, it is no doubt true that in the order passed by the Tribunal in the quantum appeal in I.T.A.No.No.371/Mds/1995 dated 31.08.1995, it sustained the addition under four heads, that there were no supporting documents relating to the expenditures.

13. However, the assessee gave an explanation on each of the four heads, which was accepted by the Commissioner of Income Tax (Appeals). As far as inland flight charges are concerned, it held that the assessee had explained the circumstances under which the provision was sustained and further proof was produced before the Commissioner of Income Tax (Appeals). In the circumstances, no penalty could be levied.

14. As far as the addition made on the allegation of the non-existent suppliers of bottles and on the difference in price were concerned, the Commissioner pointed out to the order of the Tribunal as regards the existence of two firms, which had supplied the bottles. The Commissioner referred to the finding that the suppliers were assesseees under the Act. The Commissioner of Income Tax (Appeals) further pointed out to the finding of the Tribunal, rejecting the contention of the Officer that the bottles could not have been submitted by dealers on the ground of the capability and that the firms had replied to the Assessing Officer as to how they used to purchase bottles through dealers, as well as through the brokers.

15. As regards the discrepancy as to the use of bottles, the Tribunal further pointed out to the explanation offered by the assessee that for trial

run, some bottles were sent to the factory directly without entering in the stock register and that only 2% of the entire consumption of bottles were sent directly. Pointing out that no account had been brought on record by the assessee as to the quantity of bottles sent straight to the factory, it nevertheless accepted the case of the assessee to the extent of the bottles sent to the factory and held that if at all any addition could be sustained, it could only be to the extent of 25%. It is further seen from the discussion of the Tribunal extracted in the Commissioner's order that the rate of bottles adopted by the Assessing Officer was not based on comparable cases. Taking note of the overall circumstances, the Tribunal modified the rate to Rs.1.25 per bottle in the place of Paise 69.70 per bottle, fixed

by the Commissioner of Income Tax (Appeals).

16. As regards the Section 43B addition regarding the excess provision made towards sales tax, the Tribunal pointed out to the mistake committed based on the tax audit report. Thus, based on the findings, the Commissioner held that there was no case made out, to hold that there was no intention of misguiding the Officer with regard to the particulars of income and expenditure. Thus, when the findings for deletion of penalty are based on the appreciation of facts by the Tribunal, we do not find any justifiable ground to disturb the order of the Tribunal.

17. As far as the claim of the Revenue based on the decision reported in [2001] 251 ITR 99 (M/s.K.P.Madhusudhanan Vs. Commissioner of Income Tax, Cochin) is concerned, the Apex Court pointed out that though the Assessing Officer issued a notice under Section 271 of the Income Tax Act, without reference to the explanation therein that there was no need at all to make a separate reference to the explanation being invoked, the Apex Court held that the failure to refer to the explanation would not make the penalty proceedings invalid.

18. The assessee had not raised any such dispute in the appeal before the First Appellate Authority or before the Tribunal. The defence taken by the assessee was that the additions to the income by rejecting the explanation, was not made on the ground that the explanation offered by the assessee was lacking in bona fides, but by rejecting the explanation, Section 271(1)(c) provides for levy of penalty when the assessee conceals the particulars of income or filed inaccurate particulars of income.

19. Section 271 elaborates on this through Explanation 1 to Section 271 of the Income Tax Act, which reads as under:

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

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

(a) Omitted by DTL (Amend.) Act, 1989 wef 1-4-1989.

(b) has failed to comply with a notice under sub-section (1) of section 142 or sub-section (2) of section 143, or fails to comply with a direction issued under sub-section (2A) of section 142, or

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

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

(i) Omitted by DTL (Amend.) Act, 1989 wef 1-4-1989;

(ii) in the cases referred to in clause (b), in addition to any tax payable by him, a sum which shall not be less than one thousand rupees but which may extend to twenty-five thousand rupees for each such failure ;

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the

concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

Explanation 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 Deputy Commissioner (Appeals) or the Commissioner (Appeals) 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. "

20. Applying the Explanation to the facts of the case herein, we find that the findings of the Tribunal on the assessment was not on the ground of treating the claim as not bona fide. We find that the assessment on the consumption of bottles made on the ground of alleged non-existence of two firms was rejected by the Tribunal by rendering a finding that the suppliers were very much in existence. On the 2% addition made to the bottles sent direct to the factory without entering into the books of accounts and on the price difference, the Tribunal ultimately sustained the addition to the extent of 25%. Going by the quantum appeal order, followed in the orders of the authorities below and the findings thus rendered by the authorities in the penal proceedings, we agree with the assessee's contention that the additions made were not in respect of lack of bona fides, but on the circumstances stated in the order of the Tribunal.

21. As pointed out by the learned Standing Counsel appearing for the Revenue, in the unreported decision in Civil Appeal No.6922 of 2012 dated

25th September 2012, the Apex Court held that the computation error based on the tax audit report was only an inadvertence; this would not raise a presumption against the assessee that the explanation was lacking in bona fides.

22. As pointed out by the Apex Court, the absence of due care does not mean that the assessee was guilty of furnishing inaccurate particulars to conceal his income. Applying the above-said decision to the additions made in the sale and supply of bottles as well as to the price variation, we have no hesitation in confirming the order of the Tribunal, thereby rejecting the Revenue's appeal.

In the result, this Tax Case Appeal stands dismissed. No costs.