IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH.

ITA No. 217 of 2002
Date of decision 17 .4.2012

Commissioner of Income Tax(Central) Ludhiana . Appellant

Versus

M/s Punjab Breweries Ltd. Ludhiana (now amalgamated with M/s United Breweries) .. Respondent

CORAM: HON'BLE MR. JUSTICE M.M.KUMAR
HON'BLE MR. JUSTICE ALOK SINGH

Present: Mr.Rajesh Katoch , Advocate for the petitioner

Mr. Alok Mittal, Advocate for the respondent.

1. To be referred to the Reporter or not ?
2. Whether the judgement should be reported in the Digest ?

M.M.KUMAR,J.

1. This appeal under Section 260 A of the Income Tax Act, 1961 (for brevity 'the Act') is directed against order dated 14.2.2000 rendered by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (for brevity 'the Tribunal') in ITA No. 2176/ Chandi/ 1992 in respect of the assessment year 1989-90. The Revenue has claimed that following substantive questions of law would emerge for determination of this Court:

" 1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in allowing payment of Rs. 12,29,769/- made to M/s Blue Chip and Co., Faridabad and C & F Handling Charges ignoring the fact that there was no evidence to show that M/s Blue Chip & Co. had rendered any services to the Assessee- Company; and

2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal, was right in law in allowing payment of Rs. 38,02,950/- made to the Corporate Management Division of M/s United Breweries Ltd., Banglore ignoring the fact that there was no evidence to show that the Corporate Management Division of M/s United Breweries Ltd. had rendered any services to the Assessee Company already had a Technical Assistant Agreement with M/s United Breweries Ltd. regarding provisions to the assessee of know how for manufacturing Beer and for marketing and Distribution of Beer thereby exhaustively covering all aspects of Business."

2. Brief facts of the case may first be set out to put the controversy in its proper prospective. The assessee- respondent was engaged in the manufacture and sale of beer of different brands. It was a closely held Company and a subsidiary of United Breweries Ltd. For the assessment year 1989-90 the Assessing Officer made a large number of additions. On the aforesaid two issues, the additions made are on account of payment made by the assessee- Company to M/s Blue Chip and Company, New Delhi on account of C & F handling charges. The assessee- company had obtained L-1 license at Faridabad and M/s Blue Chip. It was supposed to look after the sale of Mc Dowell Company. The assessee- company had also secured L-1 license from Herbertson and Company Ltd. Bombay for Faridabad. The assessee company was selling both Mc Dowell and Herbertson products till the assessment year 1986-87 without the help of any handling agent. It has opened a branch office at

674, Sector 16 A, Faridabad and had employed 8 persons for that office. For the first time, in respect of the assessment year 1987-88 the assessee company appointed M/s Blue Chip and Company as C & F handling agent for the purposes of sale of Mc Dowell products. In respect of the preceding assessment years i.e. 1987-88 and 1988-89, C & F handling charges claimed to have been paid to M/s Blue Chip & Company were disallowed. The Assessing Officer recorded various reasons in support of the view. One of the significant reason recorded by the Assessing Officer was that after close analysis of the evidence collected by the department and adduced by the assessee concerning services rendered by M/s Blue Chip & Company it was held that there was no material on record to show that any services were rendered by M/s Blue Chip and Company. It was also found that there was no evidence placed on record by the assessee to show that its sales were promoted by the appointment of the handling agent M/s Blue Chip and Company. From the various transactions between the Blue Chip & Company, Chairman and M.D. of United Breweries and others it was found that substantial part of the payment has been made to the Blue Chip & Company from the assessee- company as interest free loan to Shri Vijay Mallya and Smt. Samira Mallya. Agreement between the assessee company and M/s Blue Chip Company which forms the basis of C & F handling charges was found to be a sham transaction and a devise to reduce the assessee- company's taxable income as well as to create capital in the hands of Birinder Pal Singh, Proprietor of Blue Chip and Company and interest free liquidity in the hands of M/s United Breweries and Shri Vijay Mallya and his wife Smt. Samira Mallya. After the agreement, M/s Blue Chip and Company could not find any new buyer for the assessee and

the sales of Mc Dowell products showed dramatic decline after the appointment as C & F handling agent. Therefore, the entire sum of Rs.12,29,769/- was added to the declared income of the assessee.

3. On the aforesaid issue, the assessee filed appeal before the CIT (A), Ludhiana and the findings recorded by the Assessing Officer were upheld in paras 6.7 and 6.8 which reads as under:

> " 6.7 Considering the facts mentioned above and the reasons given by the ACIT and my order for the asstt. Year 1988-89 in appeal No. 41/IT/91-92/CII (A)(C) decided vide order dated 11.10.1991 the addition made is confirmed on the following grounds:
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> > i) Firstly that this L1 was earlier managed by the assessee company only and the results were much better at that time than when C & F has been given to Blue Chip and Co. and this has been forced upon the assessee by Mc Dowell and Co. at the instance of Chairman, Shri Vijaya Mallaya of U.B. group of Industries who has benefited by giving this business to M/s Blue Chip & Co. as has been proved by the ACIT.
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> > ii) Secondly, this is a sham transaction as the assessee's staff strength at Faridabad is not reduced by allotting the work to Blue Chip and Co. License fee for this L-I is also being paid by Punjab Breweries unlike in Ghaziabad Depot where License fee is collected from Max Trading Co. since the work was allotted to Blue Chip and Co. they have given interest free loans to Shri

Vijaya Mallaya, his wife and director and other relations. It is not a genuine transaction but indirectly benefiting Mrs. Samira Mallaya wife of the Chairman and also Director of the company.

6.8 Considering the above facts the addition made is confirmed and the ground of appeal is dismissed."

4. Aggrieved by the aforesaid order of the CIT(A), the assessee-respondent filed an appeal and the Tribunal made a reference to the statement of the counsel for the parties stating that the Tribunal in the preceding years 1987-88 and 1988-89 had decided the issue in favour of the assessee- respondent. However, it appears that the departmental representative categorically supported the order of the CIT(A) and yet the Tribunal proceeded to delete the additions.

5. It is true that the principles of consistency as laid down by Hon'ble the Supreme Court in the cases of Radha Soami Satsang v. CIT 1992 (193) ITR 321 and Berger Paints India Ltd. v. CIT (2004) 266 ITR 99 (SC) would ordinarily create a bar if the revenue has not preferred an appeal on a question of law which had arisen earlier by accepting the order. The aforesaid principle, however, is not absolute.

In the case of C.K.Gangadharan and another v. CIT (2008) 304 ITR 61, after accepting the earlier views of Hon'ble the Supreme Court rendered in the cases of Radha Soami Santsang (supra) and Berger Paints (supra), a 3 Judge Bench of Hon'ble the Supreme Court proceeded to hold that if the revenue has not preferred an appeal in one case it would not operate as a bar for the department to prefer an appeal in another case where there is a just cause for doing so or particularly if it is in public

interest to do so or for a pronouncement by the higher court when divergent views are expressed by the Tribunals or the High Courts. Therefore, in the instant appeal we are not inclined to accept the view taken by the Tribunal which has decided the issue merely on the ground that in respect of assessment years 1987-88 and 1988-89 the Tribunal has accepted the claim of the assessee- respondent. It would not be in public interest to accept such a claim when there is no evidence of rendering any service by Blue Chip & Company to the assessee- company. The sole object of diverting funds to Blue Chip and Company was to facilitate passing of funds as interest free loan to Shri Vijay Mallya and Smt. Samira Mallya. Agreement between the assesee- company and Blue Chip company has been found to be a sham transaction by the Assessing Officer as well as by the CIT (A). The Tribunal committed grave error by recording the impugned order as if it is a consent order whereas on the showing of the Tribunal itself, the department representative has categorically defended the order passed by the Assessing Officer as well as by the CIT(A). The aforesaid fact is clearly recorded by the Tribunal itself in paras 6 to 13 of the order which reads thus:

> " 6. The ld. Counsel at the outset stated that the Tribunal in the preceding Ays had decided both the grounds in favour of the assessee and necessary directions be given to the AO to allow necessary relief in accordance with the earlier orders of the Tribunal. The ld. DR did not oppose the aforesaid request in the light of the earlier orders of the Tribunal but hastened to add that he would support the orders passed by the tax authorities.

7. In the light of the accepted facts above, the AO is directed to allow necessary relief to the assessee in respect of grounds aforesaid in line with the view taken by the Tribunal in the preceding Ays there being no change in facts or the position of law having been pointed out by the parties. The grounds are disposed of in terms as stated.

8. Ground no.4 in assessee's appeal pertains to disallowance of Rs. 11982/- out of vehicle maintenance expenditure.

9. We have heard both the parties and have also perused the orders passed by the tax authorities. The AO rejected the claim on the following lines:

> " During the period under consideration the assessee has purchased a Mercedes car for Rs. 15,00,000/-. This car being imported one no depreciation on it has been claimed and all allowed. However, the assessee has claimed expenses for its maintenance. Perusal of the evidence filed show that the car was registered with the Registering Authority at New Delhi. This car has been maintained at Bombay and it was at the disposal of Shri Vijaya Mallaya, Chairman and Managing Director of the U.B. Limited for his personal use. The assessee has not put forward any evidence to show that the vehicle was used for the purposes of the company. In these circumstances, the expenses relating to its maintenance are being disallowed. This would result in disallowance

of Rs. 11,982/-."

10. On further appeal the CIT(A) has confirmed the view taken by the A.O. Before us the ld. counsel reiterated the arguments advanced before the tax authorities but as was the position earlier no facts were placed on record to show that the car had been used for business purposes and the expenditure claimed thereto was incidental. The reliance on Tribunal decisions reported in 10 ITD 788 and 123 TTJ 54 are without merit. In this view of the matter the disallowance is confirmed.

11. The last ground in the appeal pertaining to levy of interest u/s 234 B is consequential as per assessee's counsel and he has prayed for necessary relief to be allowed on the part of the AO while giving appeal effect to the order of the Tribunal. The ld. DR did not oppose this request and we, therefore, direct the AO to allow consequential relief.

12. In the Revenue's appeal the following two grounds are raised:

"1. The Ld. CIT(A)(C) Ludhiana has erred both in law and on facts in deleting the disallowance of Rs.1733800/- made by the AO on account of commission paid to marketing agents.

2. The ld. CIT(A) has erred both in law and on facts in deleting the disallowance of Rs.899150/- made by the AO on account of commission/ service charges paid to Bombay Breweries."

13. Both the parties agreed and stated that the aforesaid grounds had been decided in favour of the assessee by the CIT (A) following her earlier orders which in turn had been confirmed by the Tribunal. The ld. DR hastened to sup;port the order passed by the AO."

6. We are further of the view that the orders of the Tribunal in the earlier assessment years have not gone un-challenged. In respect of assessment years 1987-88 and 1988-89, the Revenue has assailed the orders in Income Tax References. In that regard a reference has been made in para 5 of the memo of appeals and those are also pending before this Court. Therefore the findings recorded by the Tribunal are wholly erroneous, cryptic, perverse, laconic and perfunctory.

7. On the second question also regarding the payment of Rs.38,02,950/- made to the Corporate Management Division of M/s United Breweries Ltd. Banglore, the assessee- company claimed that the aforesaid amount was paid as its contribution to Corporate Management Division of M/s United Breweries, Banglore for the whole group of industries controlled by this group. The assessee was given an opportunity to explain and to provide evidence of the services rendered by the United Breweries Ltd., Banglore warranting payment of such a huge amount under the head Contribution to Corporate Management Division. The Assessing Officer recorded various reasons in para 8 of its order and concluded that the expenditure is not wholly and exclusively for business purposes and even otherwise disallowable expenses, which is not allowable under the Act, the assessee could not be indirectly allowed to contribute to Corporate Management Division like entertainment or perks

disallowable under Sections 37, 40A and 40(c) of the Act. Accordingly it has been held that expenditure under this head claimed to be Rs.38,02,950/- is disallowed and was added to the income of the assessee. The appeal to the CIT (A) on the aforesaid issue has been upheld. CIT(A) rejected the ground for allowing the aforesaid expenditure and proceeded to observe as under in para 9.6 which reads thus:

> " 9.6. Actually these expenses are those expenses which are not allowable under the I.T. Act e.g. entertainment, Indian & Foreign Traveling, refreshment expenses, holiday play; giveaway (nature not known) and are clearly disallowable under the I.T. Act. Most of these expenditure is either perquisite or of executives & Directors & Chairman debited under various heads and not allowable. The facts of the case are similar to the last year where it was held that expenditure is clearly of disallowable nature and not wholly and exclusively for business where it is disallowed on the following grounds:
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> i) Firstly, what the assessee means is expenditure in CMD is first incurred and then on the basis of man-hours spent on various companies it is distributed among the group of companies of U.B. Ltd. group; that means expenditure which is incurred need not be wholly and exclusively for business purposes or allowable expenditure and this is supported by details of expenditure that expenditure is neither wholly of exclusively for the business of the assessee company nor

it is allowable u/s. 37 of the I.T. Act.

ii) Secondly, the assessee or CMD has not given any information how many total man-hours were available and at what level i.e. of Directors and Executives. How much time (Man hours) were spent on this company.

iii) Thirdly, it has not given the man-hours spent on this particular company- what services were rendered to this company.

iv) Fourthly, whether the services are rendered and the expenditure incurred is wholly and exclusively for business purpose. This has not been proved.

v) The expenditure contributed by the assessee company towards CMD is not proved to be the expenditure relating to this company. All sums are divided on same basis which is not disclosed to the revenue and it is not proved that particular incurred by CMD has anything to do with the assessee company.

vi) Sixthly, the details of expenditure show that most of the expenditure is not allowable under the I.T. Act like entertainment liquor quota, expenditure for personal use of car or is in the nature of perquisite to the Managing Director, Directors and the company executives & this exp. is indirectly claimed by row thing it through CMD. In-land Travel is equivalent to salary bill; for what purposes foreign travel has been made?

vii) Last of all whatever the evidence the assessee furnished before the AO and CIT(A) at appellate stage in

the nature of correspondence with the CMD it is covered by the Technical Assistance Agreement made with UB Ltd. for which separately ` 53,78,688/- has been paid and no other services have been rendered which is over and above this Technical Assistance Agreement. It is also held that the expenditure is not wholly and exclusively for business purposes. Even otherwise the disallowable expenditure which is not allowable under the I.T. Act the particular company cannot be indirectly allowed to CMD like entertainment or perks disallowable u/s. 37, 40A and 40(c).

The addition made of Rs. 38,02,950/- is fully confirmed and the ground of appeal is dismissed."

8. On appeal of the assessee, the Tribunal proceeded to skirt the issue by imputing the statement to the counsel for the Revenue that in the preceding assessment years 1987-88 and 1988-89 the aforesaid amount on appeal to the Tribunal was deleted and was not added to the income of the assessee- company. Despite the fact that in paras 6 and 13, the Tribunal has referred to the statement of the counsel for the Revenue that he supported the order of the CIT (A) and of the Assessing Officer. For the reasons which we have stated earlier for reversing the findings of the Tribunal on the first question of law, this question of law also deserves be decided likewise. The finding of the Tribunal even in respect of second question of law would therefore be unsustainable and is erroneous, cryptic, perverse laconic and perfunctory.

9. In view of the above, both the questions of law are answered

in favour of the revenue and against the assessee- company. As a consequence, the order of the Tribunal is set aside and that of the CIT(A) is restored.

(M.M.Kumar)
Judge

(Alok Singh )
17 .4.2012 Judge

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