REPORTED

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No. 367/2004**

M/s. Devsons Pvt. Ltd. ..... Appellant
Through: Mr.O.S. Bajpai, Sr. Advocate, with
Mr. V.N. Jha, Advocate.

versus

Commissioner of Income Tax and Ors. ..... Respondents
Through: Mr. Sanjeev Sabharwal, Advocate.

AND

\+ **ITA No. 296/2006**

Commissioner of Income Tax ..... Appellant
Through: Mr. Sanjeev Sabharwal, Advocate.

versus

M/s. Devsons Logistics Pvt. Ltd.
(earlier known as M/s. Devsons Pvt. Ltd.) ..... Respondent
Through: Mr.O.S. Bajpai, Sr. Advocate, with
Mr. V.N. Jha, Advocate.

% Date of Reserve : August 17, 2010
Date of Decision : November 19, 2010

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed

to see the judgment?

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

: REVA KHETRAPAL, J.

1. These appeals relate to the assessment year 1995-96 and was admitted to hearing on 20th March, 2006 when the following substantial questions of law were framed for consideration: -

ITA No. 367/2004

> "1. Whether the Income-tax Appellate Tribunal was right in law in holding that there was, in the facts and circumstances of the case, a change in the method of accounting introduced by the assessee without any justifiable reasons?
>
> 2. Whether finding recorded by the ITAT that there was no evidence regarding payment of ₹ 36,17,980/- by the assessee to the sub-contractor in connection with the execution of the garbage collection work is perverse?

ITA No. 296/2006

> "1. Whether the ITAT was correct in law in deleting the penalty of ₹ 36,07,220/- imposed by the Assessing Officer under Section 271 (1) (c) of the Income Tax Act, 1961?"

2. The necessary facts available on the record are that the appellant derives income as a contractor with the Jaipur Municipal Corporation (hereinafter referred to as 'the JMC') for lifting the garbage from the walled city of Jaipur and had filed its return of income on 30th November, 1995 declaring the total income of ₹4,50,317/- for the year under consideration. The appellant had shown gross receipts from JMC at ₹ 81,90,784/-. From the details of the bills submitted by the appellant, however, the Assessing Officer concluded that the total receipts of the appellant from JMC were ₹ 1,17,39,415/- as against ₹ 81,90,780/- as shown by the appellant. The Assessing Officer also concluded that the appellant had declared receipts on the basis of the amount actually received which was contrary to the system of accounting maintained by the appellant, viz., the mercantile system. Accordingly, the Assessing Officer made an addition of ₹ 35,39,631/- to the total receipts of the appellants and enhanced the income of the appellant by such amount as undisclosed income. The Assessing Officer also made a further addition of ₹ 36,17,979/- on account of sundry creditors appearing in the books of

the appellant. The Assessing Officer noted that the assessee had engaged the services of petty contractors for clearing the garbage in the city, but the payments to these contractors, though due, was not made ,but with respect to these petty contractors, the assessee had claimed deductions. The Assessing Officer issued notices under Section 133(6) of the Act to these parties, which were received back with the remark of "Incomplete address". The Assessing Officer apprised the appellant of this position on March 17, 1988 and required the appellant to furnish confirmations from these trade creditors. Further opportunities were provided to the appellant to furnish the addresses of the aforesaid sundry creditors on 19th March, 1998 and 24th March, 1998. On 24th March, 1998, the assessee-company expressed its helplessness to furnish the information given the paucity of time. The Assessing Officer did not accept the credit standing in the names of the aforesaid persons and added the same to the income of the appellant to the extent of ₹ 36,17,979/-.

3. In first appeal, the Commissioner of Income Tax (Appeals) deleted the addition of ₹ 35,39,631/- and found that the appellant had

been maintaining the accounts of income receivable from JMC on the basis of the bills submitted and approved by JMC after making various deductions as per the contract. This system of accounting had been regularly followed by the appellant and accepted by the Department since 1990. The CIT(A) also observed that there was a dispute between the appellant and the JMC on account of the non-determination of the amounts due to the appellant and on the writ petition of the appellant such matter had gone up to the Rajasthan High Court, which eventually was decided against the appellant. On facts, the CIT(A) found that on an accrual basis the appellant had actually overstated rather than understated its income for the period under consideration.

4. On the second issue of the non-confirmation of the sundry creditors, the CIT(A) was pleased to delete the addition of ₹ 36,17,979/- on the basis that the factum of rendering of services by the sub-contractors was not in dispute and the appellant had meticulously maintained log books for each sub-contract, which were duly verified and authenticated by JMC. These log books were

shown to the A.O. during the assessment and produced before the C.I.T. The latter accordingly held that the onus that lay on the appellant had been discharged and therefore the addition of ₹ 36,17,979/- was totally unwarranted.

5. Against the order of the First Appellate Authority, the Department preferred an appeal before the Income Tax Appellate Tribunal (for short 'ITAT'). The ITAT reversed the order of the CIT(A) on both counts by its order dated 4th February, 2004. As regards the addition of ₹ 35,39,631/- the ITAT held that during the period under consideration, the appellant had changed its method of accounting and such change was not bonafide. The Tribunal found that the appellant, despite the fact that that he had been maintaining the accounts on mercantile system, had declared the receipts from the JMC on the basis of the amounts actually received. The Tribunal observed that though it is the prerogative of a party to maintain accounts in the manner it likes, but the assessee cannot be at liberty to change his system of accounting at the drop of the hat, at his whims and fancies.

6. As regards the addition of ₹ 36,17,980/- on account of sundry creditors, the Tribunal observed that it was unable to agree with the findings of the CIT(A) which had deleted the addition on the ground that the onus cast upon the appellant of proving the factum of rendering services by the 8 sundry creditors of the appellant stood discharged. The Tribunal observed that from the judgment of the Rajasthan High Court passed by the Division Bench in Special Appeal (Writ No. 686/1995) arising from the order dated 20th September, 1995 passed by the Single Bench in Civil Petition No. 2816/1995, the facts that emerged are that there was not only a dispute between the JMC and the appellant with regard to the execution of the works but also with regard to the plying of the requisite number of trucks for the removal of garbage. This led the Tribunal to conclude that there was a dispute in respect of the services having been rendered by such contractors and if there was a dispute with regard to the execution of the work, the only thing the appellant was required to do was to prove it by cogent evidence, "which in this case could be either persons who had executed the works or officers

of the Jaipur Municipality." The mere filing of a log book, the Tribunal observed, was not sufficient to discharge the onus laid upon the appellant and, therefore, the CIT(A) had committed a serious mistake by deleting the additions made by the Assessing Officer. The Tribunal, therefore, set aside the order of the CIT(A) and restored the order of the Assessing Officer.

7. The appellant filed an appeal before this court sometime in January'04 against the order of the ITAT which was dismissed for non-prosecution on 16th July, 2004.

8. By an order dated 30th September, 2004, passed under Section 271 (1) (c) read with Section 274 of the Income Tax Act, 1961, the Assessing Officer imposed a penalty of ₹ 33,07,220/- by invoking the provisions of Explanation 1 to Section 271 (1) (c) on the ground that the assessee had concealed the particulars of his income and furnished inaccurate particulars. The CIT(A) by an order dated 30th December, 2004 confirmed the penalty imposed by the Assessing Officer. However, on second appeal the ITAT by its order dated 29th July, 2005 deleted the penalty imposed by the Assessing Officer on

the ground that no "satisfaction" was recorded by the AO in the assessment order before initiating penalty proceedings. On facts, the ITAT held that the assessee could not be said to have concealed its income or furnished inaccurate particulars thereof. The assessee had itself placed the details of the total bills raised against the Jaipur Municipal Corporation, according to which the total receipts of the assessee company for the financial year 1994-95 was ₹ 11,73,945/-. The amount deducted from this amount by the JMC as not payable to the appellant was, however, not declared by the appellant as its income. The non-acceptance of these particulars stated by the AO did not amount to concealment of income. Regarding penalty in respect of the balance outstanding in favour of the sundry creditors, the ITAT observed that the addition was made by the AO on the ground that the appellant was not able to prove the same. However, the credit outstanding against the same creditors was accepted by the AO in subsequent years and therefore no penalty could be levied. Since the additions were made only on account of divergent views taken with regard to the material on record, it was unsafe to conclude

that the appellant was guilty of concealment of income or of furnishing inaccurate particulars thereof.

9. Argument at the Bar were addressed by Mr. O.S. Bajpai, the learned senior counsel on behalf of the appellant-M/s. Devsons Pvt. Ltd. and Mr. Sanjeev Sabharwal, the learned counsel for the respondent-Commissioner of Income-tax.

10. Mr. O.S. Bajpai, the learned Senior counsel appearing for the appellant, at the threshold assailed the findings of the Tribunal as set out in paragraph 12 of its order dated 4th February, 2004, wherein the ITAT observed that the appellant had without justification and at the drop of the hat changed its method of accounting from mercantile to cash, which was unacceptable. Mr. Bajpai contended that what the appellant did was to take credit for income in respect of the bills that were accepted by the JMC without any deductions and wherever there were deductions, it was only the balance amount, which was taken as credit for as income, on the footing that it was only the balance that had actually accrued to the appellant. This did not amount to following the cash system of accounting but only indicated the basis

on which the assessee considered income as having accrued. It only meant that the assessee did not consider the amounts, which were deducted by the JMC from its bills as having accrued to it. The ITAT, therefore, rightly observed in its order dated 29th July, 2005:

> "***If this basis has been consistently followed as it appears to be, the assessee could not be said to have changed its method of accounting from mercantile to cash and cannot be charged with suppressing the receipts to the extent of ₹35,39,635/-."***

11. It was further observed as follows: -

> "It is also noteworthy that the figure of ₹ 1,17,39,415/- which represented the amount for which bills were raised by the assessee on JMC during the year, was furnished by the assessee itself. The further contention was that whatever has been deducted from the amount as not payable to the assessee was not taken as having accrued to the assessee. In our opinion, when all the facts have been placed by the assessee itself before the AO and a particular legal stand is taken by the assessee, which is not accepted by the AO, it cannot be said that the assessee is guilty of concealment of income. The first page of the assessment order records that "details of the total bills raised against the JMC were also furnished by the assessee according to which the total

> receipts of the assessee company for the FY 1994-95 arrive at ₹ 1,17,39,415/-. When these facts have been placed before the AO by the assessee itself as income, the assessee can be said to have taken a legal stand on the facts disclosed by it and, if such a stand is not accepted by the AO, there is no question of concealment by the assessee. Reference may be made in this connection to the following judgments:
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> 1. ITO vs. Burmah Shell Oil Storage Co. Ltd., 163 ITR, 496 (Cal.)
>
> 2. CIT vs. Late G.D. Naidu & Others, 165 ITR 63 (Mad.)
>
> 3. Cement Marketing Co. of India Ltd. ACIT, 124 ITR 15 (SC)."

12. The learned Senior counsel for the appellant was also at pains to point out that as regards the second issue, viz., addition of ₹ 36,17,980/- as well, contradictory findings had been rendered by the ITAT in its order dated 4th February, 2004 passed in quantum proceedings and its order dated 29th July, 2005 passed in the penalty proceedings. In the former order, the ITAT observed that there was no evidence on record to show, except the logbook maintained by the appellant, that the amounts were payable to the contractors for the

services rendered by them during the relevant accounting year. The Tribunal observed that the appellant should have obtained the evidence of the persons who had executed the work or of the officers of the JMC to prove that the work was actually carried out and the amounts were payable. In the latter order, i.e. in the order in penalty proceedings dated 29th July, 2005, the ITAT after referring to page 33 of the Paper Book-II and the columnar statement filed by the appellant giving the names of the creditors (in dispute) and the balances outstanding to them as on 31st March, 1995 to 31st March, 1998 (at page 267 of the paper book) and also referring to the ledger accounts of the sundry creditors placed at pages 70-109 of paper book No.-I observed that "….the addition appears to have been made only because the assessee was unable to prove the balances in the manner required by the Department, though there were other material embedded in the record itself and accepted in the subsequent assessment proceedings, to the effect that the outstanding were genuine".

13. The Tribunal noted that from the columnar statement in Paper Book No.-II, it emerged that there were a total of 8 persons to whom the appellant owned ₹ 36,17,979/- for the year under appeal. The amount outstanding to these very same persons as on 31st March, 1996, 31st March, 1997 and 31st March, 1998 was ₹ 49,93,063/-. It further noted that it was not disputed on behalf of the Department that in the subsequent assessments, the Assessing Officer had not made any additions of the balances, despite the fact that the balances were outstanding in favour of the very same persons whose names appeared in the balance-sheet as on 31st March, 1995, which the AO had added in the year under consideration. This was evident from the assessment order for the year 1998-99, which was one passed under Section 143 (3) of the Act, after scrutiny. In this order, the following observations appear: -

> "The assessee has shown in the balance sheet under the Schedule III as details of sundry creditors – hire charges of ₹ 58,55,005, but during the course of hearing it was intimated by them that it was only the payments to be made to the contractors who were plying the trucks on behalf of the company and the company had hired them for the Jaipur Municipality for removing the garbage. The list of these creditors to

whom the amount is payable have been filed and affidavits to the effect for the person concerned have been filed statement thereby the amounts receivable by them from M/s. Devsons Pvt. Ltd. (*sic*) The total amount of ₹ 58,55,005 consists of sundry creditors of ₹ 49,93,063 and other creditors for hire charges of ₹ 8,61,942. Thus, there has been a scrutiny of the amount outstanding towards these 8 persons in the subsequent years and at least in one of the assessment orders there is a finding that the amounts were actually due to them and that some of them have filed affidavits also to the effect that the amounts are due to them. At our instance, the learned counsel for the assessee pointed out to the ledger accounts of the sundry creditors placed at pages 70-109 of the paper book No.1. The account of Morari Lal to whom an amount of ₹ 4,71,658 is outstanding as on 31.3.95 is at pages 71A to 73A. The account shows that several payments were made during the year under appeal to this contractor and there has been no disallowance of the amounts so paid. This indicates that the AO has no objection to allowing the actual amounts paid to these persons, which could have been only on his being dissatisfied that such a person actually existed, that he has done work for the assessee company during the year and the payments was otherwise genuine and bonafide incurred for the purpose of the business. It is not, therefore, understood as to how the balance outstanding to such persons at the end of the year can be considered to be non genuine. The ledger account also shows that the assessee has deducted tax on the hire charges paid to Morari Lal. The ledger accounts of all the other 7 creditors have also been placed in the paper book and these also exhibit the same position."

14. The learned counsel for the Revenue, Mr. Sanjeev Sabharwal, to rebut the contentions of Mr. Bajpai, relied upon the following observations in the assessment order of the Assessing Officer: -

> "….Not even a single confirmation has been furnished by the assessee. On the basis of the address furnished by the assessee, notices u/s 133 (6) of the Income Tax Act were sent to them to confirm their credit balances. All the letters have been received back with the postal remarks "Incomplete address". The assessee was apprised of the position on 17.03.98 and he was again provided an opportunity to furnish the confirmation of these trade creditors. Thereafter, another opportunity was provided to him on 19.03.98 and 24.03.98. However, on the last date of hearing Sh. S.P. Patnaik, Manager Taxation, of the assessee company expressed his helplessness to furnish this information. Under the circumstances, the credits standing against the following names are not accepted and added to the income of the assessee company as income from undisclosed sources
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> | | |
> |---|---|
> | Ved Prakash | 4,40,758 |
> | Murari Lal | 4,71,658 |
> | Nafai Singh | 4, 41,005 |
> | Ashok Kumar | 3,90,576 |
> | Gurdyal Singh | 4,16,581 |

Surjit Singh	5,15,866
Madan Lal	4,90,247
Bhule Ram	4,51,288

	36,17,979"
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15. The contention of Mr. Sabharwal is that there was a dispute between the appellant and the JMC with regard to the execution of the work. The appellant had raised bills upon the basis of the certificates issued by the JMC for work executed, but lost sight of the fact that under the mercantile system of accounting, it was bound to show the bills on accrual basis. Mr. Sabharwal contended that the appellant could have claimed bad debts in the subsequent years but could not have changed its system of accounting. He further contended that note of the accounts attached with the audited accounts also showed that the appellant was adopting the accrual system of accounting – the income and expense has been accounted for in the mercantile method. Thus, the difference of ₹ 35,39,631/- in the receipts on accrual basis

and receipt basis was unexplainable. Mr. Sabharwal, in this context, placed reliance upon the matching concept of accounting.

16. On the second issue it was contended by Mr. Sabharwal that with regard to the issue whether the sundry creditors were genuine or not, it was not open to a coordinate Bench of the Tribunal to set aside the findings of fact arrived at by an earlier Bench in quantum proceedings. Mr. Sabharwal was, however, not in a position to dispute that there was a total of 8 persons to whom the assessee owed ₹ 36,17,979/- from the year under appeal and that during subsequent years there had been a scrutiny of the amounts outstanding towards these 8 persons, and at least in one of the assessment orders there is a finding that the amounts were actually due to them and that some of them have filed affidavits also to the effect that the amounts were due to them. Mr. Sabharwal also did not dispute on behalf of the department, that in the subsequent assessment, the Assessing Officer has not made any addition of the balances despite the fact that the balances were outstanding in favour of the very same 8 creditors whose names appeared in the balance sheet as on 31st March, 1995.

17. We propose first to examine the aspect as to whether the Tribunal was right in holding that in the facts and circumstances of the instant case, there was a change in the method of accounting introduced by the assessee without any justifiable reason. As noticed above, Mr. Bajpai on behalf of the assessee, urged that the assessee had consistently followed the mercantile system of accounting and merely because the assessee took into account the deductions made by the JMC, wherever there were such deductions, this did not amount to the assessee changing its method of accounting from mercantile to cash method.

18. It is no doubt well settled that it is not open to an assessee to adopt a hybrid system of accounting. It is also trite law that where a method of accounting has been consistently followed in the past, it may still be rejected by the Department. In ***Commissioner of Income-tax vs. British Paints (1991) 188 ITR 44,*** the Supreme Court observed that there was no estoppels in the matter of method of accounting consistently followed by the assessee and the Assessing Officer is not bound by the method followed in the earlier years, if

correct profits cannot be deduced therefrom. However, it is also well settled that the Department should not ordinarily depart from its earlier decision, more so, where such departure would result in injustice to the assessee, and the Department is bound to treat the accounts of a continuing business in a consistent manner. Even in the mercantile system of accounting it is the real income which has accrued in a practical sense that is to be brought to tax. In ***CIT vs. Shoorji Vallabhdas and Company (1959) 36 ITR 25,*** the Bombay High Court held that the question whether the income accrued or not is not a mere matter of cogency of the entries made in the account books of the assessee, but is essentially one of substance and of the real nature of what happened. A mere book entry is not conclusive of the question whether the assessee had become entitled to the sums or not and whether the income is assessable.

> "Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. *If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about*

> *a 'hypothetical income', which does not materialize."*

19. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. *Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account. See,* ***CIT, Bombay City I vs. M/s. Shoorji Vallabhdas and Company, (1962) 46 itr 144, 148 (S.C.)"*** *(emphasis supplied)*

20. The Bombay High Court in the case of ***H.M. Kashi Parekh & Co. Ltd. vs. Commissioner of Income-tax (1960) 39 ITR 706 (Bom)*** reiterated if the accounts are maintained under the mercantile system, what has to be seen is as to whether the income can be said to have really accrued to the assessee-company.

> "The two rules that income-tax is annual in its structure, meaning thereby that for computation

each year is a distinct self-contained unit, and the other that the income to be taxed is the real income of the assessee are not incompatible or irreconcilable : they permit of harmonious application.

The principle of real income is not to be so subordinated as to amount virtually to a negation of it when a surrender or concession or rebate in respect of managing agency commission is made, agreed to or given on grounds of commercial expediency, simply because it takes place some time after the close of an accounting year. In examining any transaction and situation of this nature the court would have more regard to the reality and specialty of the situation rather than the purely theoretical or doctrinaire aspect of it. It will lay greater emphasis on the business aspect of the matter viewed as a whole when that can be done without disregarding statutory language."

21. The aforesaid view of the Bombay High Court was approved by the Supreme Court in a number of subsequent decisions including ***Commissioner of Income-tax, West Bengal II vs. Birla Gwalior (P.) Ltd. (1973) 89 ITR 266.*** In the said case the Supreme Court after referring to its earlier decision in ***Morvi Industries Ltd. vs.***

Commissioner of Income-tax (1971) 82 ITR 835, which was also a case where the mercantile system of accounting was being followed by the assessee, observed (89 ITR page 273) :

> "Hence it is clear that this court in *Morvi Industries* case did emphasise the fact that the real question for decision was whether the income had really accrued or not. It is not a hypothetical accrual of income that has got to be taken into consideration but the real accrual of the income."

22. In ***Godhra Electricity Co. Ltd. vs. Commissioner of Income-tax (1997) 225 ITR page 746,*** the Supreme Court reiterated the concept of 'real income', emphasizing that even under the mercantile system, a mere claim by the assessee is not sufficient to make income accrue on the basis of 'hypothetical income' – the income must actually become due. In the said case the Supreme Court *inter alia* examined the cash system and mercantile system of accounting in the context of 'hypothetical income'. Considering the facts before it, the Court said that although the assessee company was following the mercantile system of accounting and had made entries in the books

regarding enhanced charges for the supply of electricity made to its consumers, no real income had accrued to the assessee-company in respect of those enhanced charges in view of the representative suits filed by the consumers which were decreed by the court and ultimately, after various proceedings which took place, the assessee-company had not been able to realize the enhanced charges. No real income having accrued, it was held, the amount due on enhancement was not assessable.

23. In a subsequent decision rendered in ***CIT vs. Bokaro Steel Limited (1999) 236 ITR 315,*** the Supreme Court, following its earlier decision in ***Godhara Electricity*** case (supra) affirmed the decision of the Patna High Court wherein it was held that the entry in the books of account shown as income from Hindustan Steel Ltd. for the 8 locomotives supplied by the assessee-company to them could not be brought to tax as income since this entry reflected 'hypothetical income' and only the real income could be brought to tax.

24. This court in ***CIT V vs. Modi Rubber Ltd. (1998) 230 ITR 817,*** following the decisions of the Supreme Court in ***Godhara***

Electricity Co.Ltd. (supra) and ***Shoorji Vallabhdas and Co.*** (supra), held that a mere unilateral act of the assessee debiting the books of accounts, the liability for payment whereof was not accepted or agreed to by the debtor, did not amount to income accrued to the assessee.

25. It may be noted at this juncture that the reliance placed by Mr.Sanjeev Sabharwal, the learned counsel for the Revenue on the decision of the Supreme Court in ***State Bank of Travancore vs. Commissioner of Income-Tax, Kerala (1986) 158 ITR 889*** wherein the effect of the decision of ***State Bank of Travancore's*** case (supra) was specifically considered and explained by the Court.

26. In our considered view, therefore, the Tribunal was not right in holding that there was a change in the method of accounting by the assessee company. The assessee company had submitted the details of all the bills to the Assessing Officer. The Assessing Officer as well as the Tribunal, in our view, erred in holding that the appellant had declared receipts on the basis of the amount actually received which was contrary to the system of accounting maintained by the

assessee company, viz. the mercantile system. We are, therefore, of the view that the Tribunal in the penalty proceedings has rightly observed in its order dated 29th July, 2005 that the assessee could not be said to have changed its method of accounting from mercantile to cash and cannot be charged with suppressing the receipts to the extent of ₹ 35,39,631/-.

27. Adverting to the second issue, the finding recorded by the Tribunal is that there was no evidence regarding payment of ₹ 36,17,986/- by the assessee to the sub-contractors in connection with the execution of the garbage collection work and, as such, the deletion made by the C.I.T.(A) of the aforesaid sum of ₹ 36,17,980/- was unsustainable. We are of the view that the Tribunal failed to take note of three very vital aspects of the matter. The first was the finding of the CIT(A) that the factum of rendering of services by the sub-contractors was not in dispute as the appellant had meticulously maintained log books for each sub-contract, which were duly verified and authenticated by the JMC. The Tribunal casually brushed this aside by stating that mere filing of a log book was not sufficient to

discharge the onus laid upon the appellant. The log book was a contemporaneous document maintained by the assessee company on a day-to-day basis and it was on the basis of the said log book that the claims of the assessee-company were accepted and/or rejected by the JMC, whose officials were verifying and authenticating the log books. The second was that the Tribunal altogether lost sight of the fact that the appellant had duly deducted tax at source in respect of the entire amount credited in the favour of these parties. Thirdly, it is also not disputed by the Revenue that in the assessment order for the assessment year 1998-99, the list of these sundry creditors to whom the amount was payable had been filed and their affidavits to this effect had also been filed. It is also not in dispute that the entire payment has been made to all the 8 sub-contractors as on date.

28. Another contention of the learned counsel for the Revenue is that this issue whether the sundry creditors are genuine or not could not have been re-examined by a co-ordinate Bench of the Tribunal in penalty proceedings to arrive at a contrary conclusion by relying upon the assessment order of the 1998-99 passed under Section 143(3) of

the Act after scrutiny and in particular on the following observation made therein:

> "The assesse has shown in the balance sheet under the schedule-III as details of sundry creditors – hire charges of ₹ 58,55,005/- but during the course of hearing it was intimated by them that it was only the payments to be made to the contractors who were plying the trucks on behalf of the company and the company had hired them for the Jaipur Municipality for removing the garbage. The list of these creditors to whom the amount is payable have been filed and affidavit to the effect for the person concerned have been filed stating thereby the amounts receivable by them from M/s. Devsons Pvt. Ltd.
>
> The total amount of ₹ 58,55,005/- consists of sundry creditors of ₹ 49,93,063/- and other creditors for higher charges of ₹ 8,61,942. Thus, there has been a scrutiny of the amount outstanding towards these 8 persons in the subsequent years and at least in one of the assessment orders there is a finding that the amounts were actually due to them and that some of them have filed affidavits also to the effect that the amounts are due to them. At our instance, the learned counsel for the assessee pointed out to the ledger accounts of the sundry creditors placed at pages 70-109 of paper book No.1. The account of Morari lal to whom an amount of ₹ 4,71,658 is outstanding as on 31.3.95 is at pages 71A to 73A. The account shows that several payments were made during the year under appeal to this contractor and there has been no disallowance of the amounts so paid. This indicates that the AO has no objection to allowing the actual amounts paid to these persons, which could have been only on his being satisfied that such a person actually existed, that he has done work for the assessee

> company during the year and the payment was otherwise genuine and bonafide incurred for the purpose of the business. It is not, therefore, understood as to how the balance outstanding to such persons at the end of the year can be considered to be non-genuine. The ledger account also shows that the assessee has deducted tax on the higher charges paid to Morari Lal. The ledger accounts of all the other 7 creditors have also been placed in the paper book and these also exhibit the same position."

29. We find no substance in the aforesaid contention as it is well settled that though assessment and penalty proceedings are distinct, and the findings recorded in the assessment proceedings may constitute evidence in the course of penalty proceedings, but they cannot be regarded as conclusive. This is the law enunciated by the Supreme Court in the following cases:

1. CIT & Anr. vs. Answar Ali, 761 ITR 696;

2. CIT vs. Khoday Eswarsa & Sons, 831 ITR 369 and

3. Anantharam Veersinghaiah & Co. vs. CIT, 123 ITR 457

30. In the present case, the Tribunal in assessment proceedings has restored both the additions made by the Assessing Officer, but the

question arises as to whether the said findings of the Tribunal in assessment proceedings must be regarded as conclusive and binding on a coordinate bench of the Tribunal in penalty proceedings. The answer to the aforesaid must, in our considered opinion, be in the negative. The Supreme Court in the decisions referred to in the preceding paragraphs has categorically held that it is incumbent upon the Tribunal in penalty proceedings to independently examine the evidence and the material on record for the purpose of judging whether the penalty proceedings are justified on account of concealment of income or furnishing of inaccurate particulars thereof. This, we find is precisely what has been done by the tribunal in the instant case and we cannot therefore fault the Tribunal for doing so. Even otherwise, we are in agreement with the Tribunal that the assessee is not guilty of concealment of income. We say so for the following reasons:

(i) The first page of the assessment order itself records that details of the total bills raised against the JMC were furnished by the assessee, according

to which, the total receipts of the assessee company for the assessment year in question, i.e., the financial year 1994-95 was ₹ 1,17,39,415. After disclosing the total receipts a particular legal stand was taken by the assessee. The contention of the assessee was that whatever had been deducted by the JMC as not payable to the assessee was not and could not be taken as income accruing to the assessee. This stand was not accepted by the Assessing Officer and, in our opinion, incorrectly so. Assuming however that the Assessing Officer was justified in not accepting the aforesaid legal stand taken up by the assessee, when all the facts were placed before the Assessing Officer by the assessee itself, by no stretch of imagination it can be said that the assessee had concealed the same.

(ii) As regards the addition in respect of the balance outstanding to the sundry creditors for hire charges, the addition, as held by the Tribunal, appears to have been made only because the assessee was unable to prove the balances in the manner called upon by the department, possibly due to paucity of time, but there was ample material embedded in the record itself which was accepted by the department in subsequent assessment proceedings, to the effect that the outstandings were genuine.

(iii) Divergent views amongst departmental authorities in respect of both the additions positively indicate that it would be unsafe to infer that the assessee was guilty of concealment of income or furnishing of inaccurate particulars thereof. It is trite law that where divergent views exist either within the department itself or such divergent views are

expressed by different High Courts and there is no uniformity or consensus of opinion of any aspect of law, the assessee cannot be faulted for taking a particular stand. The caveat, of course, is that the assessee must have placed all his cards on the table by disclosing each and every fact to the departmental authorities or the court concerned. If the assessee does so then merely because the departmental authorities concerned or the High Court concerned does not concur with the legal stand adopted by the assessee will not be reason enough to hold that the assessee is guilty of concealment of income or of furnishing inaccurate details. Thus, the questioner whether the assessee has invited upon himself the penalty sought to be imposed on him by the authority concerned is really a question of fact and has to be

decided keeping in mind the entire gamut of events and circumstances.

31. In the instant case, it cannot be said that the assessee withheld any relevant information regarding his income and receipts from the Assessing Officer. It bears repetition that the figure arrived at by the Assessing Officer pertaining to the income of the assessee was a figure disclosed by the assessee himself. Similarly, with regard to the addition made in respect of the sundry creditors, the very same creditors were subsequently found by the Department itself to be genuine creditors of the assessee. It is also on record that the said creditors were paid their entire outstanding amounts by the assessee and this fact has been verified by the Department from the creditors themselves. It also stands established on record that the assessee's claim against the JMC for deductions made by the JMC from the bills of the assessee was dismissed by the High Court of Rajasthan and hence the stand adopted by the assessee that no real income had accrued to him was also proved to be true.

32. With regard to the provisions of Section 271 (1) (c) of the Act pertaining to penalty, the Supreme Court has authoritatively laid down that making of a claim by the assessee which is not sustainable will not amount to furnishing inaccurate particulars. Thus, in ***CIT vs. Reliance Petro Products Pvt. Ltd. (2010) 322 ITR 158,*** the Court held as follows:

> "A glance at this provision would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The present is not a case of concealment of the income. That is not the case of the Revenue either. However, the learned counsel for the Revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. As per *Law Lexicon*, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the section 271 (1) (c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the

assessee cannot be held guilty of furnishing inaccurate particulars. The learned counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income." We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In *CIT vs. Atul Mohan Bindal (2009) 9 SCC 589,* where this court was considering the same provision, the court observed that the Assessing Officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This court referred to another decision of this court in *Union of India vs. Dharamendra Textile Processors [2008] 13 SCC 369* as also, the decision in *Union of India vs. Rajasthan Spg. & Wvg. Mills* [2009] 13 SCC 448 and reiterated in paragraph 13 that (page 13 of 317 ITR):

> "13. It goes without saying that for applicability of section 271(1)(c), conditions stated therein must exist."

33. In the case of ***Commissioner of Income-tax vs. Bacardi Martini India Ltd. (2007) 288 ITR 585 (Delhi)***, a Division Bench of this Court held that merely because there was a difference of opinion between the assessed and the Assessing Officer, it cannot be said that the assessed had intention to conceal his income. The relevant portion of the judgment is as under :

> "13. We have heard the counsel for the parties and perused the record. It has been observed by the Supreme Court in K.C. Builders and Anr v. Assistant Commissioner of Income Tax [2004]265ITR562(SC), that concealment inherently carries with it the element of means rea. It is implied in the word 'concealment' that there has been a deliberate act on the part of the assessed. The meaning of word 'concealment' as found in Shorter Oxford Dictionary III Edition, Vol-I is "in law the intentional suppression of truth or fact known, to the injury or prejudice of another". Supreme Court further observed that mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income, unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assess to hide or conceal the income so as to avoid imposition of tax thereon. In order that a penalty under Section 271(1)(iii) may be

imposed, it has to be proved that assessed has consciously made the concealment or furnished inaccurate particulars of his income.

14. It is clear from the law laid down by the Supreme Court that concealment must be accompanied with the intention of the assessed to evade his tax liability. The assessed in this case had uniformly claimed expenditure against four heads in three assessment years. When the appeal against the order of Assessing Officer before CIT (A) in respect of assessment order 1998-1999 failed the assessed instead of preferring appeal considered it proper not to litigate further as it was running into heavy losses and even if the appeal had been allowed, the assessed would not have paid any tax. The assessed in any case would have remained in heavy losses. The assessed therefore thought it proper not to prefer an appeal and after receipt of order, assessed made an application on 4.2.2003 to correct the income returns of subsequent years in accordance with order of CIT for the year 1998-1999. The assessed, therefore, filed revised returns deleting the expenses which were disallowed by the CIT (A). In the relevant year assessed had also claimed expenses of ₹ 2 crores paid by the assessed in terms of the agreement entered into by the assessed with the leasing Lesser. The assessed claimed the entire amount of ₹ 2 crores as deduction since the assessed had paid this amount of ₹ 2 Crores to the Lesser. There is no dispute that the assessed had disclosed all particulars. It was only difference of opinion between the assessed and the Assessing Officer and the assessed accepted the opinion of

the Assessing Officer instead of preferring an appeal.

15. It is not a case where assessed had not been able to explain any expenditure or had failed to give any details and the Assessing Officer had added the same into the income. In Durga Timber v. CIT 197 ITR 63, relied upon by the appellant, during the course of the assessment proceedings the Income Tax Officer had noticed cash credits and investments shown in the books of account and asked the assessed to give Explanationn. The assessed could not give Explanationn of entires nor could explain the source of income and admitted that the two amounts be treated as his concealment. Under these circumstances court observed that there was concealment of income and penalty was justified. In the present case assessed had explained all the expenditure and had actually incurred the expenditure but the expenditures were disallowed because of difference of opinion between the assessed and the Assessing Officer. This is not a case where revised return was filed as a result of discovery of some facts by the Assessing Officer or inability of the assessed to explain the expenditure. The revised return was filed because some of the expenditure were disallowed by the CIT (A) appeal for year 1998-99 although the expenditure were not doubted. There are cases where an expenditure is disallowed by the Assessing Officer and it is allowed by the CIT (A). It is again disallowed by the ITAT and in appeal allowed by the High Court and may be disallowed by the Supreme Court. Merely because there is difference of

> opinion for allowing or disallowing the expenditure between the assessed and Assessing Officer, it cannot be said that assessed had intention to conceal the income. The filing of the revised return excluding some of the disallowed expenditure and claiming expenditure of ₹ 2 crores which was actually spent by the assessed in the relevant assessment year as deduction, does not amount to concealment or furnishing inaccurate particulars. The assessed had given all particulars of expenditure and income and had disclosed all facts to the Assessing Officer. It is not the case of the Assessing Officer or the appellant that in reply to the questionnaire of the Assessing Officer, some new facts were discovered or Assessing Officer had dug out some information which was not furnished by the assessed."

34. Further in the case of ***Commissioner of Income Tax vs. Nath Bros. Exim International [2007] 288 ITR 670 (Delhi)*** it was reiterated that:

> "5. What is required to be considered is whether there was any enquiry that was required to be made by the AO before concluding that the assessed had furnished inaccurate or false particulars. In this case, we are of the view that no such enquiry was required to be made but there was only the need for application of the law. On the legal position, the AO was not satisfied and did not agree with the assessed but

> that by itself is not a ground to invoke the penalty provision of the statute.
>
> 6. Learned Counsel for the Revenue relied upon CIT v. Vidyagauri Natverlal and Ors. [1999] 238 ITR 91(Guj). In that case the question that arose was of unexplained cash credit. The Gujarat High Court made a distinction between a wrong claim as opposed to a false claim. In that case, the AO needed to make an enquiry as to whether the claim of the assessed was right or not. Insofar as the present case is concerned, the decision cited by learned Counsel for the Revenue is clearly distinguishable."
>
> 7. We find that there was full disclosure of all relevant material. It cannot be said that the conduct of the (assessed) attracted the provisions of Section 271(1)(c) of the Act."

35. In view of the aforesaid we have no hesitation in concluding that the Income Tax Appellate Tribunal was not right in law in holding that there was change in the method of accounting introduced by the assessee without any justifiable reason. The further findings recorded by the ITAT that there was no evidence regarding the payment of ₹ 36,17,980/- by the assessee to the sub-contractors in connection with the execution of the garbage work is also perverse.

Questions no.1 and 2 in ITA No. 367/2004 are accordingly decided in favour of the assessee.

36. In so far as the penalty proceedings are also concerned, we find that the ITAT was correct in law in upholding the deletion of the penalty imposed by the Assessing Officer under Section 271(1) (c) of the Act and we accordingly answer the question of law framed in ITA No. 296/2006 in the affirmative, i.e. in favour of the assessee and against the Revenue.

37. ITAs No. 367/2004 and 296/2006 stand disposed of accordingly.

REVA KHETRAPAL
(JUDGE)

A.K. SIKRI
(JUDGE)

November 19, 2010
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