IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B' DELHI
BEFORE SMT. DIVA SINGH AND SHRI K.G. BANSAL

ITA No. 1773(Del)/2010
Assessment year: 2003-04

Chadha Sugars Pvt. Ltd., Now known as Waves Industries Pvt. Ltd., 60, Friends Colony,(E), New Delhi. PAN: AAACC6691C	Vs.	Assistant Commissioner of Income-tax, Circle 3(1), New Delhi..
(Appellant)		(Respondent)

Appellant by : Shri Sanat Kapoor, Advocate

Respondent by : Shri Rohit Garg, Sr. DR

Date of hearing: 09.12.2011
Date of pronouncement: 23.12.2011.

ORDER

PER K.G. BANSAL : AM

The facts in brief are that the return was filed on 27.11.2003 declaring loss of Rs. 9,41,74,024/-. This return was processed u/s 143(1) of the Income Tax Act, 1961 ('the Act) for short) on 12.03.2004. Thereafter, notice u/s 143(2) was issued on 29.11.2004 for the purpose of making assessment. The assessment was made on 28.02.2006 u/s 143(3) of the Act at a loss of Rs. 8,63,28,303/-. The question relevant for us, arising in the assessment, is about the deductibility of expenditure of Rs. 7,80,500/- paid by the assessee to Registrar of Companies for raising the

authorized capital. The assessee had claimed the expenditure as revenue expenditure. However, the AO held the expenditure to be of capital nature in the light of decision of Hon'ble Supreme Court in the case of Punjab State Industrial Development Corporation Vs. CIT, 225 ITR 792 and Brooke Bond India Ltd. Vs. CIT, 225 ITR 798. Thus, the deduction of this amount was denied. Penalty proceedings u/s 271(1)(c) of the Act were also initiated by mentioning that the assessee has concealed the taxable income by claiming excess expenditure. These proceedings were completed on 28.03.2008 by levying the minimum penalty of Rs. 2,86,833/-. It was mentioned that the assessee furnished inaccurate particulars of income and hence it is a fit case for imposition of penalty u/s 271(1)(c). The levy was confirmed by the CIT(Appeals) by relying on the decision in the case of Union of India Vs. Dharmendra Textile Processors Ltd., (2008) 306 ITR 277 (S.C.) and CIT Vs. Escorts Finance Ltd., 183 Taxman 453 (Del). The assessee has challenged the levy on the grounds of non-recording of the satisfaction and also on merits. In this regard, five substantive grounds have been taken, which are disposed off on the basis of the submissions made by the rival parties.

2. In respect of challenge on ground of non-recording of satisfaction, the case of the ld. counsel is somewhat different from the ground taken in the appeal. Ground no. 2 states that no satisfaction has been recorded prior to initiation of proceedings u/s 271(1)(c). Hence, the notice issued and the order passed are bad in law and without jurisdiction. However, the case of the ld. counsel is that while the penalty is initiated on the ground of concealment of income, the penalty is levied for furnishing inaccurate particulars of income, therefore, the charge, on which penalty is levied, has not been communicated to the assessee in the assessment proceedings. In this connection, reliance has been placed on the decision of Hon'ble Delhi High Court in the case of Ms. Madhushree Gupta & Another Vs. Union of India & Another, (2009) 317 ITR 107.

2.1 In reply, the ld. senior DR submitted that the AO recorded a clear satisfaction in the assessment order that the assessee has concealed the income by claiming excess expenditure, therefore, penalty proceedings have been initiated separately. His submission is that the AO has not only recorded the satisfaction but also clearly indicated the charge that excessive claim of expenditure had been made. There may be some error in using the words "has concealed the taxable income", but that is not

material as it has been immediately clarified thereafter that excess expenditure had been claimed.

2.2 We have considered the facts of the case and submissions made before us. The facts are that disallowance of expenditure incurred for increasing the authorized capital was disallowed by the AO by following two rulings of the Hon'ble Supreme Court, which are binding on all quasi-judicial authorities and courts in India. No fault can be found in disallowing the amount. The AO has also recorded satisfaction, therefore, the ground taken by the assessee in the appeal is incorrect when it states that no satisfaction has been recorded. In the case of Ms. Madhushree Gupta (supra), the Hon'ble Court referred to the provisions contained in section 271(1)(c) and came to the conclusion at page 128 that the satisfaction of concealment of income or furnishing of inaccurate particulars or both should be arrived at during the course of any proceedings, but not in penalty proceedings. The case of the ld. counsel is that satisfaction about furnishing inaccurate particulars has been recorded for the first time in the penalty order, which was missing in the assessment order. Further, at page 143, after referring to some decided cases, the Hon'ble Court mentioned that the notice for initiation of penalty

must be issued only after arriving at the satisfaction during the course of assessment proceedings. In this case, we have already come to the conclusion that the satisfaction has been recorded in the course of assessment proceedings. The only question is-whether, the satisfaction is in respect of concealment of income or furnishing inaccurate particulars of income? The AO has clearly mentioned that the assessee has claimed excessive expenditure of Rs. 7,80,500/- in respect of fees paid to Registrar of Companies for raising authorized capital. This amounts to furnishing inaccurate particulars of income, therefore, the words used "has concealed the taxable income" are inappropriate. However, that does not mean that the charge has not been clearly stated in the assessment order. There is a clear mention of claim of excess expenditure, which is also the basis for levy of penalty. In view thereof, the facts of the case of Ms. Madhushree Gupta (supra) are distinguishable. Since the charge has been clearly laid out in the assessment order, we are not able to persuade ourselves to accept the argument of the ld. counsel that the charge of inaccurate particulars of income has been raised for the first time in the penalty order. Thus, grounds in this regard are dismissed.

3. Coming to the merits of the case, it is submitted that the assessee had obtained opinion from a counsel, which has been placed in the paper book on page nos. 47 to 50. The question answered ex-parte by Raman Bajaj of M/s Bajaj & Arora, Chartered Accountants, is-whether, expenditure incurred in the form of payment of fees to Registrar of Companies for increasing authorized capital shall partake the character of revenue or capital expenditure? In the opinion dated 26.03.2003, the case of CIT, Tamil Nadu Vs. Kisenchand Chellaram (India) Pvt. Ltd., 130 ITR 385 (T.N); Hindustan Machine Tools Ltd. Vs. CIT, Karnataka, 175 ITR 220 (Karnataka) and Federal Bank Ltd. Vs. CIT, 180 ITR 241 (Ker.) have been considered. Finally, in the conclusion, it is mentioned that the issue is debatable, but the controversy seems to have been put to rest by judgment in the case of Federal Bank Ltd. The apex court had held that if two views are possible, the one favourable to the assessee should be adopted. Therefore, there should be no problem with the assessee in claiming the said expenditure as revenue in the financial statements (emphasis supplied). It is further submitted that the tax-auditor has also not pointed out that the expenditure ought to have been disallowed. In this connection, reference has been made to item 17 of the tax-audit report in form 3CD, in which expenditure of capital nature has been shown as

nil. On the basis of these evidences, it is argued that since the assessee is not an expert in the field of taxation and the claim has been made on the basis of an expert advice, the levy of penalty is not justified.

3.1 On the other hand, the ld. DR referred to the computation of income, placed in the paper book on page nos. 45 and 46, and submitted that while there is a mention of deduction u/s 35D, there is no mention about the expenditure incurred by way of fees paid to Registrar of Companies. Thus, the expenditure was debited under the miscellaneous head and not shown separately. The expenditure could not have been detected by normal scrutiny as the expenditure was camouflage with other expenses without making any mention thereof in the computation of income. There is no mention of this expenditure separately in the annual accounts also. The audit-report also shows capital expenditure at nil. Accordingly, it is argued that the assessee used subterfuge to claim an expenditure which is clearly and prima facie inadmissible in view of two decisions of Hon'ble Supreme Court relied upon by the AO, which were rendered prior to filing the return of income. This is clearly a case of false claim.

4. We have considered the facts of the case and submissions made before us. The facts are that the assessee claimed an expenditure of Rs. 7,80,500/-, being the fees paid to Registrar of Companies for raising authorized capital. It is the admitted position of law that the expenditure is not revenue in nature and, therefore, it is not deductible in computing the total income. It is also the admitted fact that two decisions of the Supreme Court, adverse to the assessee, held field when the return was filed. This means that the claim is patently disallowable. It is also a fact that the claim is not discernible on the face of the record and the details of expenses have to be gone into in order to decipher the claim. The assessee's explanation is that it had taken an expert opinion from M/s Bajaj & Arora, who opined that the expenditure is revenue in nature. The assessee does not have expertise in taxation matters, therefore, relying on the opinion, the claim was made. In this connection, we may further look into the opinion furnished by M/s Bajaj & Arora. The opinion is that there should be no problem with the assessee in claiming expenditure as revenue in the financial statements. Thus, the opinion was not furnished for the purpose of claiming the expenditure as revenue expenditure for computing the total income but for accounting the expenditure in financial statements. An accountant's view is not really material for

deciding the deductibility or otherwise of an expenditure. Therefore, it follows that the claim, which was not discernible on plain reading of the accounts, was sought to be strengthened on the basis of an opinion which was merely given for preparing financial statements. In other words, the assessee knew about the problem at the time of filing of return, but the claim was still made in the face of two decisions of Hon'ble Supreme Court. Not only this, the claim was pursued even up to the level of first appellate authority in gross disregard for the decision of the Supreme Court, which the assessee came to know at least after receiving the assessment order. Therefore, it can be held that the claim was not only wrong but also false and it was persisted with for some time.

4.1 The case of the ld. counsel is that the assessee is not expected to know everything under the Income-tax law. The issue is complex. The assessee had obtained the opinion before making the claim. Therefore, in view of various decisions, the penalty should be sustained. In this connection, reliance has been placed on the decision of Hon'ble Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh & Others, (1979) 118 ITR 326, to the effect that the explanation furnished by the assessee should be taken as bona fide. The

decision mainly deals with the applicability of promissory estoppel. Thus, it was rendered in a totally different context.

4.2 Further, reliance has been placed on the decision of "A" Bench of Delhi Tribunal in the case of A.B. Movies Pvt. Ltd. in ITA No. 432(Del)/2009 dated 29.10.2010. The assessee had claimed deduction u/s 80-IB, which was supported by the certificate of the chartered accountant. It was held that the assessee was not liable to be penalized u/s 271(1)(c). The facts of this case are clearly distinguishable. Firstly, the Act makes it obligatory to obtain a certificate from chartered accountant for claiming deduction u/s 80-IB. To this extent, the chartered accountant statutorily assumes the role assigned to him for a particular purpose. No such role could be said to have been assigned to M/s Bajaj & Arora, who in any case had furnished the opinion for a limited purpose of the accounting for of the expenditure. Reliance has also been placed on the decision in the case of CIT Vs. Deep Tools (P) Ltd., 274 ITR 603. It has been held that there is nothing on record to show that the mistake of the chartered accountant was not bona-fide or it was not in accordance with the provision contained in section 80HHC(4). As in the case of A.B. Movies Pvt. Ltd., the facts of this case are also distinguishable. Reliance

has also been placed on the decision in the case of CIT Vs. S. Dhanabal, 309 ITR 268. In this case the claim u/s 80HHE was based upon the certificate of the chartered accountant, therefore, the position is similar as in the case of A.B. Movies Pvt. Ltd. (supra).

4.3 Reliance has also been placed on the decision in the case of Bijli Investment (P) Ltd. Vs. ITO, rendered by SMC Bench of Delhi Tribunal, (2007) 13 SOT 725, in which it has been held that there must be some material or circumstance leading to a reasonable conclusion that the amount represents assessee's income, and circumstances must show that there was conscious concealment or furnishing of inaccurate particulars on the part of the assessee. We are of the view that the ratio of this case does not advance the case of the assessee. Undoubtedly, the amount could not be claimed by the assessee even on a prima facie basis. It has been mentioned earlier that the assessee claimed and continued to claim the deduction up to the level of first appellate authority in the face of two adverse decisions of the Supreme Court. Thus, while even the second condition is satisfied in this case, being a conscious claim contrary to law, we have also to take into account the decision of Hon'ble Supreme Court in the case of Dharmendra Textile Processors Ltd. (supra) that mens rea

is not the ingredient of the levy u/s 271(1)(c), which has to be considered in the light of statutory provision. Thus, the material consideration is whether the assessee's claim was bona fide or not. We are of the view that facts and circumstances do not lead to a conclusion that it was bona- fide.

4.4 Reliance has also been placed on the decision in the case of CIT Vs. Shayama A. Bijapurkar in ITA No. 842 of 2010, rendered by Hon'ble Delhi High Court on 13.07.2010. In this case, the assessee had claimed that certain transactions led to long-term capital gain as advised given by the tax consultant. The Hon'ble Court held that the assessee was under bona fide impression that tax on Employees Stock Option Plan could be a long-term capital gain. This case involved classification of income and on the specific point an opinion was sought. As mentioned earlier, the opinion in the case at hand is not whether the amount is deductible in computing the total income but the mode and manner in which it should be accounted for in the books of account.

4.5 Finally, reliance has also been placed on the decision in the case of AT&T Communication Services India (P) Ltd. Vs. Dy. CIT, decided by Delhi Tribunal in ITA No. 2788(Del)/2006 for assessment year 2001-

02 on 19.03.2010, a copy of which has been placed on record. In this case, the assessee had claimed 1/3rd of the expenditure of Rs. 1.00 lakh paid to Registrar of Companies for increasing authorized capital. It is mentioned in the order that it is no doubt true that the claim is not admissible in the light of decision in the case of Brooke Bond India Ltd. (supra), but the fact remains that identical claim was allowed in the immediately preceding year, which would have given bona fide impression to the assessee that the claim is admissible. The facts of this case are also distinguishable because revenue itself had accepted the assessee's claim in the immediately preceding year leading to impression in assessee's mind that it is a deductible expenditure. No such allowance in this case was given in past.

5. On the other hand, the ld. senior DR relied on the decision in the case of CIT Vs. Escorts Finance Ltd., (2010) 320 ITR 44 (Del). It is mentioned that the court fails to understand as to how the chartered accountant, who is supposed to be expert in tax laws, could give such an opinion having regard to the plain language of section 35D. It is not the case of the assessee that the return was filed claiming the aforesaid deduction on the basis of the said opinion. Its case was that based upon

the opinion of chartered accountant, it was mentioned in the prospectus that the assessee would be entitled to relief u/s 35D of the Act. Since a finance company is not entitled to the deduction ex-facie, thus, it was not a wrong claim but a false claim. This case also shows that the assessee's reliance on tax audit report is of no consequence. The Hon'ble Court has held that it is not understandable how a chartered accountant could give such an advice. In this case, the tax-auditor has not tendered any advice but filled up relevant column without due diligence. The opinion of M/s Bajaj & Arora was not in respect of the claim under the Income Tax Act. Therefore, it can be said that the explanation tendered by the assessee is not bona-fide. It may be mentioned here that the assessee has not even sought explanation from tax auditor or M/s Bajaj & Arora, which gives the impression that whole thing is a sham.

5. The revenue has also relied on the decision in the case of CIT Vs. Zoom Communications Pvt. Ltd., (2010) 327 ITR 510 (Del). In this case, the question was regarding levy of penalty on false claim of deduction of income-tax. The Tribunal granted relief by mentioning that the explanation was bona-fide because no person would claim such a deduction. However, the Hon'ble Court did not agree with the Tribunal.

It has been mentioned that the issue of levy or otherwise of the penalty has to be decided on the basis of explanation on record. The explanation assumed by the Tribunal did not exist on record. The assessee had not explained who had committed the mistake and not explained the circumstances under which it was committed. Therefore, the general proposition that no person would claim income-tax as deduction cannot be accepted. We are of the view that the ratio of this case is applicable.

6. The assessee has not furnished any satisfactory explanation as to why a prima facie inadmissible claim was made in the return, more so when even for accounting purpose the opinion of M/s Bajaj & Arora was some what tentative. Accordingly, it is held that no satisfactory explanation has been furnished in respect of a patently false claim and, therefore, the assessee has made itself liable for levy of penalty.

7. In the result, the appeal is dismissed.

Sd/- sd/-

(Diva Singh) (K.G. Bansal)
Judicial Member Accountant Member
SP Satia
Copy of the order forwarded to:-
Chadha Sugars Pvt. Ltd., New Delhi.
ACIT,m Circle 3(1), New Delhi.

CIT(A)
CIT
The DR, ITAT, New Delhi. Assistant Registrar.