IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA NO. 809/2006

Date of decision: September 8, 2006.

Commissioner of Income Tax ... Appellant

! Through: Ms. P.L. Bansal, Advocate

Versus

$ M/s Bacardi Martini India Limited ... Respondent

^ Through: Mr. Prakash Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE T.S. THAKUR
JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? ✓
2. To be referred to the Reporter or not ? ✓
3. Whether the judgment should be report in the Digest ? ✓

SHIV NARAYAN DHINGRA: J

1. This appeal has been preferred against the order of the Income Tax Appellate Tribunal dated 28.10.2005 upholding the order of CIT in deleting the penalty

of Rs.1,33,02,242/- imposed on the assessee by the Assessing Officer under sectic (1) (c) of the Income Tax Act 1961 (for short 'the Act')

The brief facts for our consideration are -

2. The assessee is engaged in the business of production and sale of Indian made foreign liquor. The assessee filed its return for the assessment year 2001-2002 on 30.10.2001 declaring a loss of Rs.14,56,07,202/-. It filed a revised return on 28.3.03 declaring a reduced loss of Rs. 13,13,57,690/-. The assessment under section 143 (3) was completed by the AO at a reduced loss of Rs.11,38,27,726/- vide his order dated 3.3.2004. AO also initiated proceedings for concealment of income and the assessee was held guilty of furnishing inaccurate particulars of income under section 271 (1) (c) of the Act vide order dated 30.9.2004 and a penalty of Rs.1,33,03,000/- was imposed on it. A perusal of the order of the AO shows that penalty was imposed on the assessee in respect of disallowances made by the AO in the relevant assessment year and also as because assessee had filed revised return of income deleting some of the losses/ expenditure.

3. The assessee in the revised return had deleted the following expenditures:-

"A. Items in respect of which the assessee revised its return of income:

(i) Advertisement & brand promotion expenses Rs.48,30,927.00

(ii)Compensation paid to Gemini Distilleries Private Limited — Rs.10,80,000.00

(iii)Depreciation on vehicles, plant etc. — Rs. 42,418.00

(iv) Foreign Exchange loss — Rs.83,81,000.00 "

4. The assessee had claimed an expenditure of Rs. 2 crores in the relevant year as it had paid a compensation of Rs. 2 crores to M/s GDL for not entering into a similar agreement with any other party, for a period of 8 years. The AO considered that since the benefits of this expenditure were going to be for 8 years the expenditure has to be evenly distributed over eight years and entire expenditure could not be claimed in one year. He disallowed Rs.1.75 crores and allowed only an amount of Rs. 25 lac for the relevant years. AO also disallowed a contribution of Rs. 29,964/- made by the assessee towards PF and ESI since the contribution was not made on the due date. Due date of the payment of contribution was 15.5.2000 while contribution was paid on 19.5.2000. AO also added another income of Rs. 18,54,512/- while passing penalty order so the total concealed income was considered by the AO as Rs. 3,36,33,988/- It, however, transpired that income of Rs. 18,54,512/- was a calculation mistake in the order of AO and this income was not there.

5. The AO had initiated penalty proceedings on the ground that the assessee filed revised income-tax return only when it was confronted with a questionnaire issued

by AO, regarding its claim made in the original return. The AO had issue questionnaire to the assessee on 4.2.2003 asking questions regarding details of some transactions in the original return and revised return was filed on 28.3.03. The AO also considered that the expenditure disallowed by him in the revised return amounted to concealment of income by assessee.

6. The CIT (A) in the appeal filed by the assessee deleted the penalty by holding that no penalty can be imposed where in the revised return merely loss stands reduced, relying on the decision of the Supreme Court in CIT Vs. Prithpal Singh & Co. 249 ITR 670 (SC). CIT (A) also held that appellate company had disclosed all material facts in the income tax return by putting notes on income/claims and there was no ground to impose penalty.

7. ITAT, where appeal was preferred by the department, observed that there were no adequate reasons to justify imposition of penalty on the assessee for having furnished inaccurate particulars of the income or for concealment of income in terms of section 271 (1)(c) of the Act. All necessary facts were disclosed by the assessee in its return of income, accompanied by the balance sheet, profit and loss account for the year under consideration. The modified return filed by the assessee also contained self explanatory notes. A perusal of these explanatory notes shows that the assessee had given

reasons as well as reference to judicial pronouncements for claiming the expenditu could not be said that the claims made by the assessee, which ultimately came to be rejected, suffered from any suppression of facts or deliberate concealment of income or particulars. There was no finding in the assessment order of the AO that the assessee did not offer complete particulars or details whenever called for. It was not a case of non disclosure of any material which was considered necessary by the AO. As far as bonafides in filing revised returns was concerned, Tribunal observed that an appeal of the assessee involving similar expenditure in relation to earlier assessment year 1998-1999 was pending before CIT(A) and an order in respect of all four issues was passed by CIT (A) in 2002. The assessee accepted the order of CIT(A) on the four issues and revised its returns on 28.3.2003. The bonafides of the assessee can be seen from the fact that the assessee had made an application on 4.2.2003 to the assessing authority seeking permission to rectify the return for AY 1999-2000 and 2000-2001 by taking into consideration the issues decided against the assessee by the CIT(A) for AY 1998-99. Therefore, it could not be said that filing of the revised return on 28.3.03 was solely promoted by the action of AO in issuing questionnaire dated 4.2.2003. The assessee himself had taken steps to give effect to the fall-out of adverse decision of CIT(A) in the subsequent assessement years, although the time limit for reopening the assessment by

the department had already lapsed. This demonstrates the bonafide intention of assessee and intention of giving correct particulars. The assessee had taken a stand before the Tribunal that its decision not to file an appeal against the order of CIT(A) for AY 1998-99 was primarily to avoid litigation as there was no scope of positive income and it would have been an exercise purely of academic nature. Tribunal also observed that the four items of expenditure which were subject matter of revised return and were disallowed by CIT(A) was a result of a difference of opinion between assessee and the revenue and two views were possible on these disallowances. After noting the decisions referred by assessee showing other view the Tribunal observed that it could not be said that the view of the assessee claiming the expenditure in the initial return was due to lack of bonafide or it was bereft of logic. The difference of opinion was not because of any deliberate or concealment on the part of the assessee. The assessee had disclosed all necessary material and raised contentions, but such contentions were not accepted by CIT (A). It could not be said that there was concealment of material of facts by the assessee. Assessee had discharged the onus cast on it in explanation (1) of section 271 of the Income Tax Act. There was no justification for imposing penalty on the items on which assessee had filed revised return. Tribunal noted that as far as levy of penalty in relation to dis-allowances made in the assessment done by AO under Section 143 (3) of the Act

dated 3.3.2004 was concerned, the AO had not recorded his satisfaction that assess concealed any income or has furnished inaccurate particulars of his income and in view of the judgment this High Court in CIT Vs. Ram Commercial Enterprise Ltd.-246 ITR 568 and the law laid by the Supreme Court in CIT .V. S.V.Angidi Chettiar (1962) REPORTED in 44 ITR 739 (SC), in absence of satisfaction recorded by the AO the penalty proceedings were bad in law.

8. Even on merits Tribunal observed that there was no justification for imposing penalty when assessee had disclosed all facts. The payment of ESI and provident funds was made within the extended grace period and there was no adequate reason to disallow the amount. Claim of assessee of Rs. 2 crores as expenditure was bonafide and disallowance of Rs.1.75 crore was due to difference in opinion between assessee and AO.

9. We have heard learned counsel for the parties and perused the record. It is argued by Ms.Prem Lata Bansal, counsel for the appellant that filing of a revised return was not a mitigated factor to exonerate the assessee from penalty provisions. An assessee is supposed to file a correct return of income at first instance and any incorrect return of income claiming false deductions which are disallowed by the AO, should be considered as concealment of income. A revised return withdrawing the false claims amounted to an

admission on the part of the assessee of furnishing incorrect particulars of its in The Tribunal was wrong in holding that suo-moto filing of revised return showed bonafides of the assessee.

10. It is contended by the learned counsel for the appellant that in Durga Timber Vs. CIT Delhi 197 ITR Page 63, assessee could not satisfactory explain two amounts claimed as deductions and conceded that same be treated as his income. Penalty was imposed for concealment of income, which was set aside by Tribunal. On appeal this Court held that it would amount to laying an impossible burden of proof on the department and making the provisions for imposition of penalty wholly unworkable if even after the assessee had admitted that the two amounts could be treated as its concealed income, the department had still to prove by independence evidence that the assessee had concealed its income. The levy of penalty for concealment of income was justified. It is submitted that in view of this judgment since respondent had filed a revised return and admitted that some of the expenditure claimed by it be disallowed and be considered as his income, the imposition of penalty was justified and the Tribunal wrongly held that there was no concealment of income. More so when the re-assessment made by the Assessing Officer has been accepted by the assessee, the revenue was not supposed to prove any thing further to show that there was concealment. The reliance is

also placed on in J.R. Investments Limited Vs. C.I.T.- 1972 ITR (2005), where court had held that so long as return filed by the assessee gives inaccurate particulars of his income and so long as amount was not offered for taxation, the filing of a revised return after deduction by Assessing Officer of an inaccurate particular would make little difference. In this case High Court confirmed the penalty even after filing of a revised return. It is argued that deleting the penalty by ITAT even disallowing expenditure i.e. compensation of Rs. 1.75 crores paid to M/s GDL on the ground that no satisfaction was recorded by the Assessing Officer before initiating penalty, was bad in law since the satisfaction of the Assess Officer was discernible from the Assessment Officer itself. In D.M. Manasvi vs. Commissioner of Income-tax 86 ITR 557 Supreme Court had upheld the levy of penalty in view of the fact that satisfaction was clearly discernible from the Assessment Order and it was not necessary for the Assessing Officer to record specifically how he was satisfied. It is submitted that in the present case the Assessing Officer at the foot of Assessment Order had clearly indicated that penalty proceedings under section 271 (1) (c) of the Act were being initiated separately. This pre-supposes that the Assessing Officer had arrived at necessary satisfaction. Support is sought from Angidi Chettiar case (supra).

11. It is submitted that mere disclosure of the information by the assessee in

the audited does not mean that the assessee has disclosed all particulars. The asse: supposed to show his income correctly and is not allowed to claim frivolous expenditure.

12. The respondent on the other hand has taken support from the order of CIT-ITAT and argued that the penalty was rightly struck of. There was no concealment of income by the assessee. It is submitted that the assessee had filed income tax return for 1998-1999, 1999-2000 and 2000-2001 claiming certain expenses as admissible deductions. The assessment order in respect of 1996-1997 was received by the assessee after his filing original return for years upto 2001-02, in which some of the expenses were disallowed. On receiving this order, the assessee sought rectification of subsequent years return since assessee wanted to give effect to the order of CIT (A) for year 1998-1999. The assessee had claimed advertisement and brand promotion expenses: depreciation of plant and machinery and losses due to foreign exchange fluctuation in all the returns. After CIT (A) order disallowing the amount on account of these heads was received by the assessee, the assessee suo motu took steps to rectify the returns for subsequent years. The assessee filed an application for rectification on 4.3.2003 without the knowledge that a questionnaire has been issued by the Assessing Officer on the same date. The intention to rectify the returns had been expressed on 4..2.2003 itself and revised returns were filed in consequence of this intention. The stand taken by the

appellant that the rectification was done because of the questionnaire issued by belied by these facts. The assessee had paid a sum of Rs. 2 Crores to M/s GDL and claimed the amount believing that since the amount has been paid under a contract to M/s GDL for not entering into agreement with other parties, the amount would be deductible in the year in which it has been paid, but the Assessing Officer thought otherwise and spread the amount over 8 years and allowed deduction of Rs.25,00,000/-as expenses. The fact that the entire information and the reasons for deduction were given to the Assessing Officer in the return is not denied. There was no concealment of income and if the Assessing Officer had difference of opinion that does not mean that there was concealment. Counsel argued that there had been no intention on the part of the assessee to conceal income at any point of time rather assessee had given all facts and figures categorically in the original return as well as in the revised return. There was no intention on the part of the assessee to conceal income and the satisfaction of the Assessing Officer even if it was there, it was without any basis.

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 & Anr Vs. Assistant Commissioner of Income Tax- 2004 ITR Vol. 265 page 562, that concealment inherently carries with it the element of mens ria. It is implied in the word 'concealment' that there

has been a deliberate act on the part of the assessee. The meaning of word 'conceal as found in Shorter Oxford Dictionary III Edition, Vol-1 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 assessee 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 assessee to evade his tax liability. The assessee 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 assessee 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 assessee would not have paid any tax. The assessee in

any case would have remained in heavy losses. The assessee therefore thought it not to prefer an appeal and after receipt of order, assessee 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 assessee, therefore, filed revised returns deleting the expenses which were disallowed by the CIT (A). In the relevant year assessee had also claimed expenses of Rs.2 crores paid by the assessee in terms of the agreement entered into by the assessee with the leasing lessor. The assessee claimed the entire amount of Rs. 2 crores as deduction since the assessee had paid this amount of Rs. 2 Crores to the lessor. There is no dispute that the assessee had disclosed all particulars. It was only difference of opinion between the assessee and the Assessing Officer and the assessee accepted the opinion of the Assessing Officer instead of preferring an appeal.

15. It is not a case where assessee 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 Vs. CIT 197 ITR Page 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 assessee to give explanation. The assessee could not give explanation 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 concealm income and penalty was justified. In the present case assessee had explained all the expenditure and had actually incurred the expenditure but the expenditures were disallowed because of difference of opinion between the assessee 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 assessee 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 assessee and Assessing Officer, it cannot be said that assessee had intention to conceal the income. The filing of the revised return excluding some of the disallowed expenditure and claiming expenditure of Rs. 2 crores which was actually spent by the assessee in the relevant assessment year as deduction, does not amount to concealment or furnishing inaccurate particulars. The assessee 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 discove Assessing Officer had dug out some information which was not furnished by the assessee.

16. We find that appellant's contention of concealment of income by the assessee or furnishing of false particulars by the assessee has no basis. There is no force in the appeal and the appeal deserves to be dismissed and is hereby dismissed. No order as to costs.

SHIV NARAYAN DHINGRA, J.

September 8, 2006

T.S. THAKUR, J.

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