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IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH "I" DELHI)

BEFORE SHRI I.P. BANSAL AN SHRI R.C. SHARMA

ITA NOS. 4596 & 4597(Del)2005  
Asstt.years: 2001-02 & 2002-03

Mahanagar Telephone Nigam Limited,  
Jeevan Bharti Bldg. New Delhi.

Addl. Commissioner of I.Tax,  
V. Range 4, New Delhi.

(Appellant)

(Respondent)

Appellant by: Shri Ved Jain & Ms. Rano Jain, CA  
Respondent by: Shri R.K. Paliwal, CIT/DR

ORDER

PER I.P. BANSAL, J.M.

These are appeals filed by the assessee which is a public undertaking and they are directed against two separate orders of CIT(A) dated 23.11.2005 and 24.11.2005 for assessment years 2001-02 and 2002-03 respectively. Permission from High Power Committee on Dispute has been obtained by the assessee to contest these appeals. Vide order dated 8.5.2006 assessee has been granted permission as per entries 3&4 to contest these appeals. A copy of such permission is placed on record. Accordingly we proceed to decide these appeals on merit.



2. For assessment year 2001-02 the main grievance of the assessee is regarding levy of penalty u/s 271(1)(c) on rejection of claim u/s 80 IA amounting to Rs. 1705,39,51,689/- and also for disallowance made u/s 43 B of the Act of Rs. 57,31,49,273/-. On such disallowances penalty of Rs.6749925574/- has been imposed.
3. For asstt.year 2002-03 concealment penalty has been imposed for similar wrong claim of deduction u/s 80 IA(4C) penalty has been imposed at Rs.1771521137/-. Penalty has been upheld by CIT(A). The assessee is aggrieved hence in appeal.
4. The levy of penalty has been contested before us on the ground that no satisfaction was recorded by AO while initiating concealment penalty and it is mentioned that penalty is untenable in the eyes of law and the same has been passed by the Addl.CIT who cannot be an Assessing Officer within the meaning of section 2(7)(A) of the Act and CIT(A) has ignored the contention of the assessee that no penalty is leviable as the assessee has disclosed all the facts in the return file by the assessee and as such there is neither concealment nor furnishing of inaccurate particulars of income. It is also mentioned in the grounds of appeal that on facts and in law CIT(A) has erred in holding that the assessee is not entitled to deduction u/s 80 IA despite the fact that the assessee has fulfilled all the conditions applicable to a tele-communication

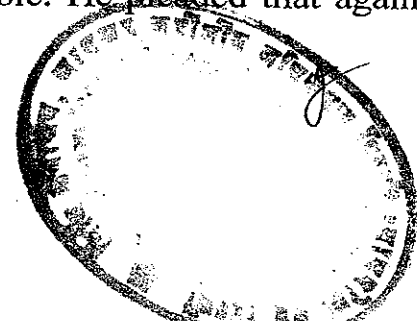


services to make it eligible for deduction u/s 80 IA. It is mentioned in the grounds of appeal that allowability or otherwise of deduction u/s 80 IA was at least controversial or debatable and thus no penalty could also be imposed as the claim of the assessee was bona fide one. On these grounds sustenance of penalty has been agitated by the assessee in its appeals.

5. The Id. AR of the assessee informed that for assessment years 1998-99, 1999-00, 2000-01 and 2002-03 Tribunal vide its order dated 3.2.2006 has set aside the issue of allowability of deduction u/s 80 IA to the file of AO with its observations in para 60 which are being reproduced below for the sake of convenience:-

“60. We have heard the parties with reference to the material on record. The relevant provisions of Statute have also been perused. It appears to us that the appellant has an arguable case but the authorities below have not passed any speaking order on the appellant's claim as to whether the appellant could be held an “undertaking” after it had put up new exchanges to the new subscribers and meets out the essential requirement so as to be eligible for deduction u/s 80-IA of the Act. If the appellant did not press its claim in the earlier years, that alone should not be taken as a disqualification for this purpose. We, therefore, set aside the decision of the authorities below and restore the matter back to the AO for taking a decision afresh in the light of aforesaid directions. A reasonable opportunity of being heard shall be afforded to the appellant before taking decision in accordance with law.”

6. For assessment year 2001-02 he informed that though Tribunal had decided that deduction u/s 80 IA was not available. He pleaded that against



the said order of the Tribunal the assessee had filed an appeal before the Hon'ble High Court which is decided vide order dated 15.12.2006 and following order has been passed by the Hon'ble High Court:-

“Having heard the submissions of the Id. Counsel for the parties and also materials on the record, we are of the view that the matter should be remanded to the AO for taking a decision afresh on the question of deduction u/s 80-IA of the Income Tax Act, 1961. Accordingly, the impugned order dated 11.10.2004 passed in ITA No. 535/D/2003 for the A.Y. 2001-02 is set aside. The matter is remanded to the AO for taking a decision afresh.

The appeal stands disposed of.”

7. He has placed a copy of the above-mentioned order on record.
8. So as it relates to disallowance of Rs. 185.14 crores, Rs. 11.85 crores and Rs. 38,037/- u/s 43 B of the Act. Tribunal had restored this issue to the file of AO vide its order dated 11.10.2004 in ITA No. 5359(Del)03 as per para 6 which is reproduced below for the sake of convenience:-

“6. Third ground in the appeal relates to disallowance of Rs. 185.14 crores, of Rs. 11.85 crores and Rs. 38,037/- u/s 430B of the Act in respect of contribution of provident fund, pension fund etc. In this regard, it was the contention of the Id. Counsel that certain employees of DOT were absorbed by the assessee and the necessary documents in support of this explanation could not be placed on record at the assessment stage as they were not available at the relevant time. The necessary presidential orders were received later on and hence could not be placed before the AO. Considering the fact that certain documents are now available which the AO could not examine, we remand this issue back to the file of the AO with a direction to decide

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the same afresh after considering all the evidence that the assessee may adduce in this regard and also after having adequate opportunity of being heard to the assessee.”

9. Thus he pleaded that the position as it now stands is that the entire additions on which concealment penalty has been imposed are set aside to the file of AO as per above-mentioned orders.

10. He pleaded that the assessee had made detailed submissions while claiming deduction u/s 80 IA. These submissions form part of the return itself and submissions have been reproduced at pages 7&8 of the assessment order. It was pleaded that referring to the provisions of section 80 IA (4C) it was mentioned that this section is applicable even to old undertaking as intention of CBDT was not to extend this benefit only to new undertaking. Section was introduced in 1997 which cover all the companies which provided tele-communication facility on or after 1995. A clear interpretation of the section will indicate that assessee is entitled to the concession being the only company in the country providing basic telecommunication services. Reference was made to the circular issued by the CBDT and thus the claim of the assessee was based on sound footings. All the particulars were disclosed in the return itself and thus there was no concealment so as it relates to particulars and facts. He contended that penalty cannot be imposed merely for rejection of claim. In the case of assessee the Tribunal has restored the



issue to the file of AO and had there been no case of the assessee the claim made would have been rejected at the level of Tribunal. Thus, he pleaded that it cannot be said that there was no case of assessee for claiming deduction u/s 80 IA. He contended that where an issue is debatable in that case also penalty is not leviable. Relying on grounds of appeal he pleaded that penalty has wrongly been imposed by AO and sustained by CIT(A), therefore, the same should be deleted.

11. On the other hand, the Id. DR relying on the order of AO and CIT(A) pleaded that order of CIT(A) should be upheld.

12. We have carefully considered the rival submissions in the light of material placed before us. The additions on the basis of which present penalties have been imposed have already been set aside and the issues have been restored back to the file of AO. The relevant orders have been reproduced in the above part of this order. At best the present case can be a case of a debatable claim of deduction. The law in this regard is well settled that when the assessee has claimed some deductions which are debatable, it cannot be said that the assessee has concealed any income or has furnished inaccurate particulars of its income for evasion of tax. In such cases it has been held that Tribunal was justified in cancelling the penalty u/s 271(1)(c). Reference can be made to the decision of Hon'ble Rajasthan High Court in

the case of CIT v. Harshvardhan Chemicals & Mineral Ltd. 259 ITR 212(Raj) wherein on rejection of claim of the assessee regarding deduction u/s 80 HH and 80 I concealment penalty was imposed and it was held by the Tribunal that when the assessee has claimed some amount though that is debatable, in such cases, it cannot be said that the assessee has concealed any income or furnished inaccurate particulars for evasion of tax. The order of the Tribunal has been upheld by their Lordships with the following observations:-

“4. The finding of the Tribunal that when the assessee has claimed some amount though that it debatable, in such cases, it cannot be said that the assessee has concealed any income or furnished inaccurate particulars for evasion of the tax. In view of the findings of the Tribunal, no case is made out for interference by this Court.”

13. Recently jurisdictional High Court in the case of CIT v Bacardi Martini India Ltd. 288 ITR 585 (Del) has held that merely because there is difference of opinion as to allowability of the payment between the assessee and the AO, it cannot be said that the assessee had intention to conceal income. Where it is not the case of revenue that some new facts were discovered or AO had tugged out some fresh information from the reply to the questionnaire of the AO, concealment penalty cannot be levied for concealment of income or for furnishing of inaccurate particulars of income.



The following observations of their Lordships from the said decision are reproduced below:-

“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 AO had added the same into the income. In *Durga Timber Vs. CIT(supra)*, relied upon by the appellant, during the course of the assessment proceedings the ITO 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 entries 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 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 AO. This is not a case where revised return was filed as a result of discovery of some facts by the AO 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) in appeal for year 1998-99 although the expenditure were not doubted. There are cases where an expenditure is disallowed by the AO and it is allowed by the CIT(A). It is again disallowed by the Tribunal and in appeal allowed by the High Court and may be disallowed by the SC. Merely because there is difference of opinion for allowing or disallowing the expenditure between the assessee and the AO, it cannot be said that the assessee had intention to conceal the income.”

14. Further in the case of *CIT v. International Audio Visual (supra)* recently jurisdictional High Court has held that where the assessee has claimed deduction u/s 80 HHC in respect of sale of dubbing rights of film to a foreign company and AO did not accept the claim and concluded that the payment received by the assessee was royalty and not consideration for sale

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of goods or merchandise, the assessee was under a bona fide that it was selling goods or merchandise by selling dubbing rights. Though the contention of the assessee may have been incorrect but there is nothing to suggest that it misrepresented the particulars of income or concealed its true income. There being no concealment of primary facts assessee is not liable for penalty u/s 271(1) (c). The observations of their Lordships from the said decision are reproduced below for the sake of convenience:-

- “5. Having examined the record and heard Id. Counsel for the revenue, we are of the opinion that there is nothing to suggest that the assessee was in any manner trying to mislead the AO. It appears that he had a bona fide belief that by selling dubbing rights to a foreign company, he was selling goods or merchandise within the meaning of sec. 80HHC of the Act.
6. The AO did not agree with this contention and concluded that the payment received by the assessee was towards royalty and not sale of goods or merchandise. The contention urged by the assessee may have been incorrect but there does not appear to be anything to suggest that it reflected on the particulars of the income of the assessee or any concealment of his true income.
7. Under the circumstances, since there was no concealment of primary facts, it cannot be said that the assessee was liable to suffer a penalty under the provisions of sec. 271(1)(c) of the Act.
8. We do not find any error in the view taken by the Tribunal in concluding that the assessee was not liable to be penalized for raising a contention which was not acceptable to the AO. No substantial question of law arises for our consideration.”



15. It has been held by the Hon'ble Supreme Court in the case of K.C. Builders & ANR. Vs. ACIT, 265 ITR 562 (SC) that the word 'concealment' inherently carried with it the element of mens rea. The observations of their Lordships from the said decision are reproduced below for the sake of convenience:-

"9. One of the amendments made to the above-mentioned provisions is the omission of the word "deliberately" from the expression "deliberately furnished inaccurate particulars of such income". It is implicit in the word "concealed" that there has been a deliberate act on the part of the assessee. The meaning of the word "concealment" as found in Shorter Oxford English Dictionary, Third Edn., Vol. 1, is as follows:

"In law, the intentional suppression of truth or fact known, to the injury or prejudice of another."

The word "concealment" inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if takes out the case from the purview of non-disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. 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 assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty u/s 271(1)(iii) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income. Where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted, there remains no basis at all for levying the penalty for concealment and, therefore, in such a case no such penalty can survive and the same is liable to be cancelled as in the instant case. Ordinarily, penalty cannot stand if the assessment itself is set aside. Where an order of assessment

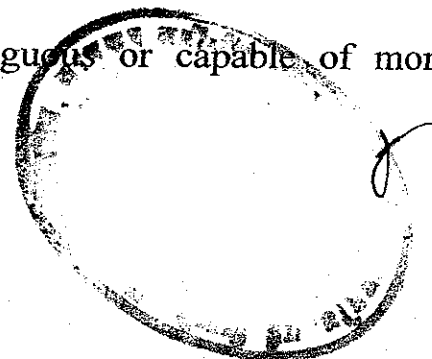
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or reassessment on the basis of which penalty has been levied on the assessee has itself been finally set aside or cancelled by the Tribunal or otherwise, the penalty cannot stand by itself and the same is liable to be cancelled as in the instant case ordered by the Tribunal and later cancellation of penalty by the authorities.”

16. Looking the facts of the present case in the light of law discussed as above, we are of the opinion that penalties levied are required to be quashed.

~~There was no concealment of particulars of income or furnishing of inaccurate particulars of such income as envisaged in section 271(1)(c). All the facts were clearly disclosed while making the claim. Moreover, additions for which concealment penalty has been levied are set aside to the file of AO by the Tribunal and Hon'ble High Court and thus the very basis of levy of penalty itself does not survive.~~

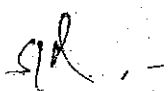
17. The claim of the assessee at least can be designated to be a debatable claim on which there can be conceivably be two opinions. In such a situation also no penalty is leviable as per the well established law discussed in the decision of Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products Ltd. 88 ITR 192 (SC). In the said case it is held that if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well accepted rule of construction recognized by Apex Court in several of its decisions. If it is found that language to be construed is ambiguous or capable of more




meanings than one, than the same be interpreted in a manner which favours the assessee, more particularly when provision relates to imposition of penalty. Looking the facts of present case in the light of above mentioned decision of Supreme Court in the case of CIT Vs. Vegetable Products Ltd. (Supra), it is not a fit case where levy of concealment penalty can be held to be justified.

18. In view of above discussion, levy of penalty in the present case for both the years is quashed and the appeals filed by the assessee are allowed.

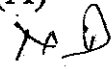
Order pronounced in the open court on 24.08.2007.

  
 (R.C. Sharma)  
 Accountant Member

  
 (I.P. Bansal)  
 Judicial Member

Dated: 27.08.2007  
 \*RM

copy forwarded to:

1. Mahanagar Telephone Nigam Limited,  
 Jeevan Bharti Bldg. New Delhi.
2. ACIT, Range 4, New Delhi.
3. CIT
4. CIT(A)
5. DR 

True copy

by order

  
 Dy. Registrar

