Gopal Das Estates & Housing Pvt. Ltd., ... vs Assessee on 29 October, 2011

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

BEFORE SHRI G.D. AGRAWAL, HON'BLE VICE PRESIDENT
AND SHRI A.D. JAIN, JUDICIAL MEMBER

ITA No.5296(Del)2011
Assessment year: 1996-97

Gopal Das Estates & Housing Pvt. Ltd. Asstt.Commissioner of I.Tax,
18th floor, Dr. Gopal Das Bhawan, v Comp.Cir., 12, New Delhi.
28, Barakhamba Road, New Delhi.

(Appellant) (Respondent)

Appellant by: Shri K. Sampath, Advocate
Respondent by: Shri Salil Mishra, Sr. DR

ORDER

PER A.D. JAIN, J.M.

This is assessee's appeal for the assessment year 1996-97 against the order dated 29.10.2011 passed by the Commissioner of Income Tax(Appeals)XV, New Delhi, confirming the penalty of ` 5,04,445/- imposed on the assessee u/s 271(1)(c) of the I.T. Act.

2. The facts are that the assessee had filed its return of income, declaring an income of ` 4,49,82,973/-. The assessed income, however, was arrived at by the AO at ` 10,09,16,861/-. For doing so, the AO made the following additions:-

2 ITA 5296(Del)2011 `

1. Deduction u/s 24 disallowed 1,96,07,320/-

2. Compensation paid to flat owners Disallowed 54,21,407/-

3. Brokerage & commission disallowed 51,50,323/-

4. Interest paid to bank disallowed 1,94,72,700/-

5. Legal & Professional charges Disallowed 27,20,000/-

6. Unabsorbed depreciation disallowed 4,59,448/-

7. Foreign travel disallowed 15,82,083/-

8. Business promotion disallowed 2,15,000/-

9. Fees paid to Registrar disallowed 3,05,600/-

_____ 5,59,33,881/-

_____ The addition on account of disallowance of fee paid to the Registrar of Companies, amounting to ` 3,05,600/-, was accepted by the assessee, surrendering the claim in this regard, vide letter dated 14.9.98 filed before the AO.

3. Apropos the disallowance of foreign travel expenses of ` 15,82,083/-, such expenses were claimed in the Profit and Loss Account. Before the AO, in the assessment proceedings, the assessee 3 ITA 5296(Del)2011 explained that the foreign travels were undertaken by the officials of the assessee limited company with a view to promote the sale and leasing of space and to hold negotiations with a South Korean Company for collaboration in the business of colonization. The assessee filed before the AO a draft of Memorandum of Understanding proposed to be signed with the Korean Company. Copies of various other documents to support the claim that the foreign travels were undertaken for the purpose of the assessee's business, were also filed before the AO. In the AO's opinion, however, there was no business of the assessee outside India and therefore, there was no necessity for any foreign travel by its officials. The AO also observed that since the negotiations with the South Korean Company was for a new project, the expenditure on foreign travel should have been capitalized. The AO also refused to accept the assessee's contention that the foreign travel had resulted in leasing of space to Commercial Bank of Korea and Korean Development Bank. The AO observed that leasing of space was not the business of the assessee Company and the income from leasing out was assessable as income from house property which does not qualify for such expenditure.

4 ITA 5296(Del)2011

4. The ld. CIT(A), by virtue of order dated 30.11.99, deleted the disallowance of foreign travel expenses. While doing so, the ld. CIT(A) observed that the assessee's business consisted of real estate, which included letting out unsold stock in trade; that the leasing of space by the assessee was, therefore, part of its business; that although the income from let out property is computed under the head of income from house property, the expenditure incurred on exploitation of stock in trade is admissible as business expenditure; that since the assessee had incurred foreign travel expenses on the foreign travels by its employees to secure business of leasing of space and possible collaboration in the Project of colonization, the expenditure on foreign travel qualified for deduction.

5. The Tribunal, vide order dated 4.9.09, partially confirmed the disallowance, observing that the assessee was engaged in the business of construction of property for sale and also leasing out of space; that the AO had made the addition for the reason that the expenses were incurred in connection with leasing of space and such expenses were not allowable as income from house

property; that as available from the assessment order, the assessee had submitted that the expenditure had been incurred in respect of both promotion of sale and leasing of space 5 ITA 5296(Del)2011 and also for collaboration in the field of construction with South Korean Company, in which regard, copy of Memorandum of Understanding had also been filed; that considering all these facts, the whole of such expenditure could not be disallowed merely for the reason that only rental agreement were entered into by the assessee, because it is not necessary that every expenditure must necessarily, result any inclusive arrangement for earning of Revenue, that too, the total expenditure cannot also be allowed, having regard to both types of income earned by the assessee; and that so, the interest to justice would be met if 50% of the foreign travel expenditure was disallowed. The Tribunal modified the CIT(A)'s order accordingly, to this extent.

6. In the penalty order dated 30.7.2010, apropos the issue of fees paid to Registrar of Companies, the AO observed that it has been clearly held in various decisions that the fees paid to Registrar of Companies for announcing the share capital is capital in nature; that the assessee also knew this fact but he deliberately made a mala fide claim of revenue expenditure in this regard; that the intention of suppressing its taxable income; and that the mala fide intention of the assessee was confirmed by the fact that it never preferred any appeal against the AO.

6 ITA 5296(Del)2011

7. So far as regards the issue of disallowance of foreign travel expenses, the AO observed in the penalty order that the assessee's contention that the expenditure on foreign travel was incurred for promotion of sales and leasing of space, had not been accepted by the Tribunal; that the assessee had mala fide claimed the said expenditure as business expenditure, knowing that the same would not be allowable under the head of house property.

8. By virtue of the impugned order, the ld. CIT(A) confirmed the penalty on both the counts. So far as regards the fees paid to Registrar of Companies for increasing the authorized capital, the ld. CIT(A) held it to be a capital expenditure. It was observed that it was impossible to believe that the assessee having been in the advantageous position to have the benefit of legal advice and Chartered Accountant, etc., could claim that it was not aware of the legal position.

9. The same position was held to be true for the foreign travel expenses also. Besides, it was observed that the assessee had admitted that the foreign travel expenses were incurred in order to promote the sale and leasing of space and to hold negotiations for collaboration with South Korean Company; that where the income from leasing of space is taxed as house property income, the assessee's claim of foreign 7 ITA 5296(Del)2011 expenses being business expenditure was patently wrong; that had the assessee's case not been selected for scrutiny u/s 143(3) of the I.T. Act, the assessee would have got away for its claim of business expenditure. The ld. CIT(A) placed reliance on the decision of the Hon'ble Delhi High Court in the case of "CIT v. Zoom Communications Pvt. Ltd.", 327 ITR 510(Del), D. & Shroff v. ACIT", 291 ITR 519(SC), "T. Ashok Pai v. CIT", 292 ITR 11(SC), "Union of India v. Dharmendra Textile Processors", 306 ITR 277(SC), "CIT v. Reliance Petro Products Pvt.Ltd.", 322 ITR 158(SC), "CIT v. Atul Mohan Bindal", 317 ITR 1(SC) and "Union of India v. Rajasthan Spinning & Weaving Mills"

[2010] 1 GSTR 66(SC).

10. Before us, apropos the issue regarding penalty levied on fees paid to the Registrar for share capital, the learned counsel for the assessee submitted that the assessment year concerned is assessment year 1996-97; that the return was filed on 30.11.96; and that the assessee. Upto the stage of finalization of assessment, was not aware of the Supreme Court judgment in "Brooke Bond Ltd. V. CIT", 225 ITR 798(SC) and "Punjab State Industrial Development Corporation v. CIT", 225 ITR 792(SC), wherein, it has been held that expenditure incurred by a Company in connection with issue of shares, with a view 8 ITA 5296(Del)2011 to increase its share capital, is directly related to the expansion of the capital base of the Company and the capital expenditure, even though it may incidentally be held in the business of the Company and in the profit making. It has been submitted that both these decisions were delivered after the return of income had been filed and he never came to know of them till the finalization of the assessment proceedings.

11. Apropos the issue of levy of penalty on foreign travel expenses claimed, the learned counsel for the assessee has contended that whereas the total claim was disallowed by the AO, the ld. CIT(A) deleted the whole disallowance and the Tribunal allowed ½ relief to the assessee and penalty was levied on 50% of 15.82 lakhs; that this penalty was, as such, levied on an estimated disallowance/addition, which is impermissible in law. The learned counsel for the assessee has placed reliance on "Reliance Petro Products"(supra).

12. The ld. DR, on the other hand, has staunchly supported the impugned order. It is submitted that the decision in "Brooke Bond"(supra), was very much available at the time of assessment proceedings and the assessee has itself made the addition in its letter dated 14.9.98, which has been reproduced in toto in the impugned order. With regard to the issue concerning penalty on foreign travel 9 ITA 5296(Del)2011 expenses, the ld. CIT(A) has also placed reliance on "CIT v. Zoom Communications"(supra).

13. We have heard the parties and have perused the material on record. So far as regards the levy of penalty on the addition of ` 3,05,600/-,i.e., fees paid to Registrar, which was disallowed, it is seen, that the return was filed on 30.11.96. "Brooke Bond India" (supra), delivered by the Hon'ble Supreme Court, is dated 27.2.97, as available from the report at 225 ITR 798. As per this decision, the expenditure incurred by a Company in connection with issue of shares with a view to increase its share capital is directly related to the expansion of the capital base of the Company and the capital expenditure even though it may incidentally be held in the business of the Company and in the profit making.

14. Evidently, thus, "Brooke Bond India" (supra), came after the assessee had filed its return of income for the year under consideration in the scrutiny assessment

proceedings. Before this decision, the legal position with regard to the payment made to the Registrar of Companies for increasing authorized share capital of a Company, was fluid. The assessee had claimed the expenditure as a revenue expenditure and this claim was based on a numerous High Court decisions delivered by the 10 ITA 5296(Del)2011 Hon'ble Madras High Court, Hon'ble Karnataka High Court, Hon'ble Andhra Pradesh High Court and Hon'ble Kerala High Court, though several other High Courts had taken a view on this issue in favour of the Department.

15. In "Brooke Bond India" (supra), the Hon'ble Supreme Court had followed its decision in "Punjab State Industrial Development Corpn. Ltd. v. CIT", 225 ITR 792(SC). "Punjab State Industrial Development Corpn. Ltd." (supra), it is seen, is dated 4.12.96. So, even this decision was delivered post filing of the Income Tax return for the year by the assessee on 30.11.96. In "Punjab State Industrial Development Corpn. Ltd." (supra), it was held that fees paid to Registrar of Companies for enhancement of capital , being fees paid for expansion of the capital base of the Company is directly related to the capital expenditure incurred by the Company and incidentally that would certainly help in the business of the Company and may also help in profit making, it still retains the character of capital expenditure since the expenditure is directly related to the expansion of the capital base of the Company.

16. From the date of delivery of "Punjab State Industrial Development Corpn. Ltd." (supra), i.e., 4.12.96 and that of "Brooke 11 ITA 5296(Del)2011 Bond India" (supra), i.e., 27.2.97, it is evident that obviously, these decisions were not available to the assessee when it filed its return of income under scrutiny assessment on 30.11.96. That being so, it cannot, at all, be said that qua this issue, the assessee had either furnished inaccurate particulars of income or had concealed its income so as to attract the levy of penalty u/s 271(1)(c) of the Act. True, the Hon'ble Supreme Court, while rendering the decision, declares the law as it always had been. However, for the purpose of levy of penalty, the date of such decision is material. As in the present case, if the decision of the Hon'ble Supreme Court in favour of the assessee is not available to the assessee at the time of filing of the return of income under scrutiny assessment proceedings, and before the Supreme Court decision, the law on the issue is not settled and there are divergent judicial opinion, both in favour of the assessee as well as in favour of the Revenue, the assessee cannot be faulted to say that it had either concealed its income or had furnished inaccurate particulars of its income. It is also true that in "Union of India v. Dharmendra Textile Processors", 306 ITR 277(SC), it has been held that if the assessee makes a claim which is incorrect, inter alia, penalty u/s 271(1)(c) of the I.T. Act is leviable. However, in the present case, since the legal 12 ITA 5296(Del)2011 position on the issue of nature of expenditure by way of payment of fees to the Registrar of Companies for expansion of the capital base of the Company was settled by "Punjab State Industrial Development Corpn. Ltd." (supra), as followed in "Brooke Bond India" (supra), which were delivered post filing of the return by the assessee, the assessee cannot be held guilty of either

concealment of income or of furnishing inaccurate particulars of its income, "Dharmendra Textile Processors" (supra), being not attracted to the facts of the present case. The AO, while levying the penalty, obviously went wrong in observing that the assessee "deliberately with a mala fide intention claimed this as a revenue expenditure", notwithstanding the fact that as per "Dharmendra Textile Processors" (supra), mens rea is not necessary to be proved by the Revenue for civil penalties.

17. In "CIT v. Reliance Petro Products Pvt. Ltd.", 322 ITR 158(SC), it has been held that where no information given in the return of income filed is found to be incorrect, making of an incorrect claim does not amount to concealment of particulars. It was held that:-

"Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting penalty u/s 271(1)(c) a mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the 13 ITA 5296(Del)2011 assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars."

It was also held that :-

"In order to expose the assessee to penalty, unless the case is strictly covered by the provision, penalty provision cannot be invoked with by no stretch of imagination can make an incorrect claim tantamount to furnishing of inaccurate particulars."

18. In "Atul Mohan Bindal", 317 ITR 1(SC) and "Union of India v. Rajasthan Spinning & Weaving Mills" (supra), taken note of by the ld. CIT(A) in the impugned order, also, it has been held that for applicability of section 271(1)(c), the conditions stated therein must exist.

19. "CIT (LTU) v. MTNL, dated 10.10.2011, rendered by the Hon'ble Delhi High Court in ITA 626/2011, as observed by the ld. CIT(A), also follows the above view. Therefore, it is amply clear that as on the date of the filing of the return of income by the assessee, the legal position on the issue had not been settled in favour of the Revenue. This was done only later by the Hon'ble Supreme Court, by virtue of "Punjab State Industrial Development Corpn. Ltd." (supra) and "Brooke Bond India" (supra) and so, no penalty qua this issue was leviable. Accordingly, the concealment penalty on the issue of payment of fees to Registrar of Companies is cancelled.

14 ITA 5296(Del)2011

20. Apropos the assessee's plea of not being in the knowledge of "Brooke Bond" (supra), and "Punjab State Industrial Development Corpn. Ltd." (supra) till the assessment was finalized, as noted hereinabove, both these decisions came after the filing of the return of income by the assessee. It is well settled that nobody can be presumed to know the law. In this regard, the Hon'ble Supreme Court has, long ago, in "Motilal Padampat Sugar Mills Co. Ltd. V. State of Uttar Pradesh and

Others", 118 ITR 326(SC), held that:

> "Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that every one is presumed to know the law, but that is not a correct statement: there is no such maxim known to the law. Over a hundred and thirty years ago, Maula J. pointed out in Martindale v. Falkner [1846] 2 CB 706: "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so." Scrutton L.J. also once said: "It is impossible to know all the statutory law, and not very possible to know all the common law. " But it was Lord Atkin who, as in so many other spheres, put the point in its proper context when he said in Evans v. Bartlam [1937] AC 473 : "…….the fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application. " It is, therefore, not possible to presume, in the absence of any material placed before the court, that the appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dated 25th June, 1970. We, accordingly, reject the plea of waiver raised on behalf of the State Government."

15 ITA 5296(Del)2011

21. In the present case, no material has been brought by the Department that the assessee was in the knowledge of "Brooke Bond"

> (supra) or "Punjab State Industrial Development Corpn. Ltd." (supra) during the assessment proceedings.

22. Now, coming to the issue of levy of concealment penalty on the addition of ` 15,82,083/- being disallowance of foreign travel, the total claim of the assessee pertaining to foreign travel expenses, amounting to ` 15,82,083/- was disallowed by the AO, holding that there was no business of the assessee outside India; that as such, there was no necessity for foreign travel by the officials of the assessee Company; that since the negotiations with a South Korean Company were for a new Project, the expenditure on foreign travel ought to have been capitalized; that leasing of space was not the business of the assessee Company and the income from letting out of the property was assessable as income from house property, which did not qualify for such expenditure, due to which, the assessee's contention that foreign travel had resulted in leasing of space to Commercial Bank of Korea and Korean Development Bank was not acceptable.

23. In the quantum first appeal, the ld. CIT(A) deleted the entire disallowance made by the AO observing that the assessee's business 16 ITA 5296(Del)2011 consisted of real estate, which included leasing out of unsold stock in trade; that thus, leasing of space was part of the business of the assessee Company; that although income from letting out of property is income from house property, the expenditure incurred on the exploitation of the stock in trade is admissible as business expenditure; and that since the assessee Company had incurred foreign travel expenses on foreign

travels by its employees to secure business of leasing of space and possible collaboration in the Project of colonization, the expenditure on foreign travel qualified for deduction.

24. On appeal by the Department, the Tribunal partially confirmed the disallowance. The Tribunal, vide order dated 4.9.09, partially confirmed the disallowance, observing that the assessee was engaged in the business of construction of property for sale and also leasing out of space; that the AO had made the addition for the reason that the expenses were incurred in connection with leasing of space and such expenses were not allowable as income from house property; that as available from the assessment order, the assessee had submitted that the expenditure had been incurred in respect of both promotion of sale and leasing of space and also for collaboration in the field of construction with South Korean Company, in which regard, 17 ITA 5296(Del)2011 copy of Memorandum of Understanding had also been filed; that considering all these facts, the whole of such expenditure could not be disallowed merely for the reason that only rental agreement were entered into by the assessee, because it is not necessary that every expenditure must necessarily, result any inclusive arrangement for earning of Revenue, that too, the total expenditure cannot also be allowed, having regard to both types of income earned by the assessee; and that so, the interest to justice would be met if 50% of the foreign travel expenditure was disallowed. The Tribunal modified the CIT(A)'s order accordingly, to this extent.

25. Observing that the assessee's contention regarding the expenditure on foreign travel having been incurred for promotion of sales and leasing of space having not been accepted by the Tribunal, in the penalty order, the AO observed that the assessee had claimed the expenditure mala fide as business expenditure, even though it knew that this expenditure was not allowable under the head house property.

26. While confirming the penalty on this count, the ld. CIT(A) observed that where the income from leasing of space is treated as house property income and taxed as such, the foreign expenses cannot be claimed as business expenditure.

18 ITA 5296(Del)2011

27. From the progress of the case in the quantum proceedings, as noted herein above, it is seen, that the nature of the expenditure, i.e., as to whether it was allowable or not, has been differently taken at different stages. Whereas the AO disallowed the entire expenses claimed, the ld. CIT(A) deleted the entire disallowance and ultimately, allowed half relief to the assessee. As such, the assessee is correct in contending that the penalty was levied on an estimated disallowance. Relying on "Reliance Petro Products" (supra), the assessee contends that this is not permissible in law and where the disallowance was made on an estimate basis, no concealment penalty was leviable.

28. The ld. CIT(A) has held, confirming the penalty, that it was the admitted case of the assessee that foreign travel expenses were incurred with a view to promote sale and leasing of space and to hold negotiations for collaboration with South Korean Companies; that since the income from leasing of space is taxed as income from house property, the claim of the assessee of foreign expenses as business expenditure was patently wrong.

29. In the quantum appeal before the ld. CIT(A), it was held that leasing of space by the assessee was part of its business, since the assessee's business consisted of real estate including letting out unsold 19 ITA 5296(Del)2011 stock in trade. The Tribunal, vide order dated 4.9.09, took note of the fact that the assessee was engaged in the business of construction of property for sale and also in the business of leasing of space, i.e., the assessee did not hold that letting out of space was not the assessee's business. It would be appropriate here to reproduce the relevant observations of the Tribunal:-

> "We have considered the submissions made by both the sides, also perused the material on record and the orders of the authorities below. It is noted that assessee is engaged in the business of construction of properties for sale and also leasing out of a space. The AO has made the impugned addition for the reason that such expenses were incurred in connection with leasing of a space activity, hence, not allowable under the head 'income from house property'. However, from the perusal of the assessment order it is also noted that the assessee had submitted that the impugned expenditure had been incurred in respect of both promotion of sale and leasing of a space and also for collaboration in the field of construction with a South Korean Company. In this regard, copy of Memorandum of Understanding was also filed. If these facts are also considered, then, whole of such expenditure cannot be disallowed merely for the reason that only rental agreements were entered into by the assessee because it is not necessary that every expenditure must necessarily result into conclusive arrangements for earning of revenue. Having stated so, we are of the view that the total expenditure can also not be allowed having regard to both types of income earned by the assessee, hence, in our opinion, interest of justice could be met if 50% of foreign travel expenditure is disallowed. Accordingly, the order of ld. CIT(A) is modified to this extent. Thus, these grounds of Revenue stand partly allowed."

30. Thus, the Tribunal effectively over-turned the finding of the AO that leasing of space was not the business of the assessee and the 20 ITA 5296(Del)2011 fact that the disallowance qua foreign travel expenditure claimed was, however, restricted to 50%, in our considered opinion, does not bring the assessee within the ken of the provisions of section 271(1)(c) of the Act. Here also, neither concealment of income nor furnishing of inaccurate particulars of income of the assessee stands established. The sale of constructed space was shown by the assessee as income and income from unsold stock was shown as stock in trade. To bolster this stance of the assessee , comes the fact that the brokerage and commission paid for arranging the lease out of constructed space was allowed by the Tribunal as a business expenditure and this is stated to have been approved by the Hon'ble High Court . The expenditure on foreign travel was claimed by the assessee as a business expenditure. In fact, no finding has been shown to have been recorded by the Tribunal that the expenditure so claimed by the assessee had either not been incurred by the assessee or had been falsely claimed.

31. Therefore, in keeping with "Reliance Petro Products"(supra), since there is no concealment of particulars of income by the assessee in the return of income filed just because the claim of expenditure made by the assessee was an incorrect claim, does not amount to concealment of particulars under the provisions of section 271(1) (c) of the Act.

21 ITA 5296(Del)2011

32. "Zoom Communications Pvt. Ltd."(supra), relied on by the ld. CIT(A), does not act to the detriment of the present assessee. In the present case, the claim made in view of the above discussion, cannot be said to be having absolutely no foundation. Moreover, it is evident from the above that in making the claim, the assessee did not act mala fide.

33. Therefore, in our considered view, the penalty on this issue is also not leviable and the same is hereby cancelled.

34. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 04. 05.2010.

Sd/-	sd/-
(G.D. Agrawal)	(A.D. Jain)
Vice President	Judicial Member

Dated: 04.05.2012
*RM

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

True copy

By order

Assistant Registrar