आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, बी, मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA NO.5454/Mum/2011
Assessment Year: 2004-05

Mangalam Drugs & Organics Ltd., 292, Princess Street, Second Floor, Near Flyover Mumbai -400002	**बनाम**/ Vs.	DCIT 4(2), Aayakar Bhavan Mumbai-400020
(निर्धारिती /Assessee)		(राजस्व /Revenue)
P.A. No.AAACM7880P		

निर्धारिती **की ओर से /** Assessee by	Shri M. Subramanain (AR)
राजस्व **की ओर से** / Revenue by	Mrs. J. K. Garg(DR)

सुनवाई की तारीख **/ Date of Hearing :**	**25/08/2015**
आदेश की तारीख /**Date of Order:**	**24/09/2015**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

The present appeal has been filed by the assessee against order dated 04.05.2011, passed by the Ld. Commissioner of Income Tax (Appeals)-8, Mumbai for the assessment year

2004-05. The assessee has raised following grounds of appeal:-

> *"1. Grounds mentioned hereunder are without prejudice to one another.*
> *2. The learned C.I.T.(A) has erred in Law and on facts in sustaining the Penalty of Rs.22,08,681/- u/s 271(I)(c) of the Income Tax Act without appreciating the following;*
> *(a) That the sum of Rs.53, 16,657/ - being the amount of disallowances of deduction u/s 80IB was done contrary to the full disclosure and on the basis of report of auditors in Form No.10CCB which was attached with the return of income*
> *(b) That the sum of Rs.3,44,238/- being the amount of disallowance of deductions u/s 80 HHC was also done contrary to the full disclosure on the basis of declaration by auditors which too was attached to the return of income. This amount was not considered for levy of 271(1)(1) in the assessment order.*
> *(c) Penalty on wrong claim of Rs.76,1l3/- has been levied without considering the fact that here again the amount was worked out by the auditors in the tax audit report which too was attached with the return of income.*
> *(d) Penalty on Rs.3,75,OOO/- for disallowance on account of which interest has been levied though in the original assessment this amount was not considered for levy of penalty u/s 271(1)(c)."*

2. During the course of hearing, it was brought to our notice by the Ld counsel that the quantum appeal has already been decided by the ITAT and copy of ITAT's order has been placed on record.

After hearing both the sides, grounds raised by the assessee are adjudicated as under:

3. Ground No.2(a): The assessee has agitated the action of Learned Commissioner of Income Tax (Appeals) {(hereinafter called as Ld CIT(A)} in confirming the action of AO(hereinafter called as 'AO') in levy of penalty on the amount of disallowance of Rs.53,16,657/- with respect to deduction claimed by the assessee u/s 80IB.

3.1 During the course of hearing, it was brought to our notice that this issue has been sent back to the file of AO by the Hon'ble ITAT.

3.2 We have gone through the order of ITAT, in which has been noticed by us that the issue with regard to deduction u/s 80IB has been sent to the file of AO by ITAT. In view of these facts, the levy of penalty with respect to this disallowance is hereby cancelled. The AO is at his liberty to initiate the penalty on this issue, after re-deciding this issue, as may considered appropriate by him, at that stage, as per law and facts. Thus, Ground no.2(a) is allowed for statistical purposes.

4. Ground No.2(c) is: with regard to levy of penalty on wrong claim of Rs.76,113/-. This ground has not been pressed by the Ld. Counsel and therefore, Ground no.2(c) is dismissed and levy of penalty on this amount is confirmed.

5. Ground No.2(d), is with regard to levy of penalty of Rs.3,75,000/- for disallowance on account of interest. It is seen by us from the order of ITAT that this disallowance has been deleted. Thus, the whole premise of levy of penalty on

this issue ceases to exist. The very basis of levy of penalty is no more in existence, thus penalty cannot remain alive any more. Thus, levy of penalty with respect of disallowance of Rs.3,75,000/- on account of interest is hereby deleted.

6. Ground no.2(b) is with regard to levy of penalty on the disallowance of Rs.3,44,238/- being the amount of disallowance of deduction u/s 80 HHC in the quantum appeal. The assessee did not press this ground before the ITAT and it was dismissed by the ITAT without giving any decision of any merits of disallowance.

6.1. We have heard both the sides on this issue and find that penalty would not be leviable with respect to the disallowance made by the AO u/s 80HHC for the following reasons:

(i) Similar disallowance was made by the AO u/s 80HHC in assessment year 2003-04 i.e. immediately preceding year. It has been shown to us, on the basis of penalty order of assessment year 2003-04 passed by the AO u/s 271(1)(c) dated 28th March 2008, that no penalty was initiated or levied by the AO with respect to disallowance made u/s 80HHC in assessment year 2003-04. In our considered view, when the AO has found that penalty was not leviable with respect to similar disallowance made for deduction u/s 80HHC in A.Y. 2003-04, then following the same yardsticks, he should not take a different stand in this year and burden the assesse with rigorous provisions of penalty. The revenue is expected to follow some consistency with regard to penal provisions. We

derive our support from the judgment of Hon'ble Supreme Court in the case of CIT vs. Excel Industries Ltd. 358 ITR 298(SC) for the proposition that consistency should be followed by the Revenue on year to year basis for deciding various issues of the taxpayers. In absence of consistent approach, it may give rise to a chaotic situation and avoidable litigation, which may in turn hamper voluntary compliance by the taxpayers.

(ii) It has been noted by us that the AO has made disallowance on the basis of return of income filed by the assessee and audit report of the assessee. The assessee has made its claim in the profit and loss accounts and computation sheet giving complete facts and particulars. Thus, it cannot be said that there was concealment of facts. The assessee had made a claim, duly supported with the audit report from the qualified accountant. The claim was not found allowable by the AO, in his opinion. Under these facts and circumstances, Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt Ltd 322 ITR 158(SC), has held that it would not be a fit case for levy of penalty.

(iii) It is further seen by us that it is a well known fact that there has been enormous litigation on account of interpretation of section 80HHC, throughout the country, various tax experts and courts are still grappling with the complexities in appreciation and interpretation of provisions of section 80HHC. These provisions are full of controversies. Under these circumstances, the assessee has taken stand and

made a claim accordingly. Merely because the claim of the assessee was not found allowable by the AO in its opinion, it should not *ipso facto* give rise to an inference that there was concealment of income or furnishing of inaccurate particular of income by the assessee. The Assessee had made a *bonfide* claim as per the advice received by it, under these circumstances it cannot be said that the assessee's claim was bogus or wholly erroneous. Under these circumstances, it cannot be said to be a fit case for levy of penalty.

(iv) It is further noted, from the perusal of penalty order, that the penalty has been levied, on all the additions/disallowances, in a 'whole sole' manner. The AO has not given his findings, for levying the penalty, for each issue separately, with respect to the satisfaction of the AO for each of the issue respectively, nor has he given a finding for each issue separately as to whether there was a concealment of income or furnishing of inaccurate particulars of income. The AO has held in the penalty order that various disallowance made by the AO have been confirmed by the Ld CIT(A) and therefore, it is automatically established that the assessee has concealed its income and furnished inaccurate particulars, which has led into concealment of income within the meaning of section 271(1)(c) of the Act. In our considered view, this approach of the AO for levy of penalty is not correct as per law. Penal provisions are quite harsh, these can make the assessee liable for prosecution, as well. Therefore, the AO is obliged, under the law, to make application of his mind

meticulously and carefully for each issue separately and to show and establish precisely and specifically whether there was concealment of income or there was furnishing of inaccurate particulars of income on the part of the assessee, at the stage of filing of return of income. The Assessee cannot be fastened with the liability of penalty without there being a clear or specific charge. Fixing a charge in a vague and casual manner is not permitted under the law. Fixing the twin charges is also not permitted under the law. We drive support from the judgment of Hon'ble Gujrat High Court in the case of New Sorathia Engineering Co vs CIT 282 ITR 642 (Guj).

It is further noted by us that the AO has held that since the disallowances have been confirmed, it is established that the assessee has concealed its income and penalty is automatically leviable. In our view, this approach is also not acceptable as per law. It is now a well settled law, that the assessment proceedings are 'independent' proceedings. In a given situation, the assessee may be liable for assessment of his taxable income, but that would not, necessarily and automatically, make the Assessee liable for levy of penalty as well, on the income assessed. The parameters for imposition to tax and for levy of penalty are different under the law. Grave errors are done by the AOs, under the law, when both are mixed up. The assessee may be liable to be taxed for want of substantiation of the claim made by the Assessee, but for levy of penalty, the AO may be required to disprove the claim or to show that the claim made by the assessee was bogus. In the

present case, no such exercise has been done at all by the AO while levying the penalty and the penalty has been levied in a highly automatic, mechanised and casual manner. This kind of approach gives rise to avoidable hardships to the taxpayers and should be avoided. Therefore, keeping in view the aforesaid discussion, we find that levy of penalty on the disallowance of deduction u/s 80HHC was not justified and therefore, same is deleted and Ground No.2 (b) is allowed.

7. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 24th September 2015.

Sd/-	Sd/-
(Joginder Singh)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 24/09/2015

*Patel, P.S.*नि.स.

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**