

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “F”, NEW DELHI
BEFORE SH. BHAVNESH SAINI, JUDICIAL MEMBER
AND
SH. L.P.SAHU, ACCOUNTANT MEMBER
ITA No. 4023/Del/2016
(Assessment Year: 2009-10)**

Prafful Industries (P) Ltd. 349, Katra Naya, Chandni Chowk New Delhi	Vs.	DCIT Circle-14(1), C.R.Building, Bhadurshah Zafar Marg New Delhi
PAN : AAACP1335N		
(Appellant)		(Respondent)

Assessee by	Sh. Sanjay Nath, CA
Revenue by	Sh. Atiq Ahmad, Sr. DR

Date of Hearing	23.01.2018
Date of Pronouncement	15.03.2018

ORDER

PER L.P.SAHU, ACCOUNTANT MEMBER

This is an appeal filed by the assessee against the penalty order by the CIT(A) – 7, New Delhi order dated 26.05.2016 for the assessment year 2009-10 on the following grounds of appeal :-

“1. The action of the learned CIT(A) in upholding the penalty levied by DCIT Circle 14(1) of Rs. 2,22,240/- u/s 271(1)(c) is unjust, illegal, arbitrary, illusory and against the facts of the case and thus deserves to be deleted.

2. The action of the lower authorities in not following the case laws on the issue and in spite of legal precedents, still not quashing the penalty of Rs. 2,22,240/- is unjust, illegal, arbitrary, illusory and against the facts of the case and thus deserves to be deleted.”

2. The brief facts of the case are that the assessee filed return of income on 29.09.2009 declaring income of Rs.63,52,180/-. The assessment was completed u/s 143(3) by making certain additions, including the addition on account of excess claim of depreciation of Rs.14,21,000/- and Rs.8725/- on account of disallowance of proportionate expenses u/s. 14A read with Rule 8D. The Id. CIT(A) in quantum proceedings, restricted the disallowance of depreciation to Rs.7,10,000/- and sustained the addition u/s. 14A. Based on these additions, the AO initiated penalty proceedings and after considering the submissions of the assessee, imposed a penalty of Rs.2,22,241/- u/s. 271(1)(c) of the IT Act for furnishing inaccurate particulars of income on the premise that the assessee had received capital subsidy on 10.2.2009 under TUFF Scheme, from Ministry of Textile of the Rs. 40,60,000/- for setting up of plant & Machinery which the assessee has shown as a part of reserve instead of deducting the same from cost of fixed the assets (Plant and Machinery) and therefore, the assessee had claimed excess depreciation of Rs. 14,21,000/- for the whole year. He also observed that the addition of Rs.8,725/- was not contested by the assessee in the quantum proceedings. He, therefore, observed that the assessee has furnished inaccurate particulars of income and is liable for penalty.

4. Aggrieved by the order of assessing officer, he appealed before the CIT(A) and the CIT(A) sustained the penalty on excess claim of depreciation to the tune of Rs. 7,10,500/- and deleted the penalty imposed on the basis of addition made u/s. 14A of the Act. Aggrieved of the order of the

CIT(A), the assessee is in appeal before the Tribunal, challenging the sustenance of penalty imposed by the AO.

5. The Id. AR reiterated the submissions made before the CIT(A) and he also submitted a written synopsis and paper book and relied upon case laws.

The written synopsis submitted by the assessee reads as under :-

“Assessee is a private limited company in the business of doing job work of printing and dyeing of fabrics during the relevant year. In the assessment framed u/s 143(3) the following two additions amongst others were made by him:-

a) A sum of Rs. 7,10,500/- was disallowed out of depreciation claimed by the company on its plant and machinery. The facts of the case are that during the relevant year the company had received capital subsidy from Ministry of Textiles to the tune of Rs. 40,60,000/-. The scheme of the Ministry in giving the subsidy to all eligible units was to encourage setting up of new units in the textiles sector in the state of Gujarat. Assessee had set up its unit in Surat, Gujarat. The subsidy was based on the cost of plant and machinery installed. However as stated earlier it was to encourage setting up of new plants and not as reimbursement of the cost of machinery installed by the assessee.

b) The assessee created a capital reserve of Rs. 40.60,000/- in the balance sheet based on the decision of M/s P J Chemicals Ltd. given by the Supreme Court. It did not reduce the cost of the asset and claimed depreciation on the entire cost of plant and machinery installed.

c) The AO did not accept the version of the assessee company and allowed depreciation after reducing the subsidy received as per definition of Actual cost given in section 43(1) of the Act.

d) Thus the depreciation allowed by him was reduced by Rs. 14,21,000/- being 17.5% of the subsidy amount of Rs. 40,60,000/-.

1. Another disallowance of Rs. 8,725/- was made u/s 14A. As per the latest decision of Delhi High Court in the case of Joint Investment Private Limited, the addition u/s 14A cannot exceed the exempted income. The assessee company does not have any exempted income and under the circumstances no addition should have been made on this account.

2. The two additions made above after CIT(A) order were also subject to penalty u/s 271(l)(c). In-spit e of assessee submissions the AO passed the penalty order and levied a penalty of Rs. 2,22,241/- being 100% of the tax sort to be evaded. We are in appeal before you against this levy.

3. *Even on the facts of the case as described in para 1 above it can be appreciated that penalty has been levied by holding that assessee has claimed excess depreciation in its return. The AO has stated that no reply has been received in response to the notice. It is submitted that I had personally filed a letter with the AO giving case laws that no penalty can be levied in case of claim of depreciation since it does not amount to concealment. Assessee's file was not on the AO's table and he had kept the letter and had assured me that my reply will be considered. The same has not been done as per his order.*

4. He has cited case laws of various courts based on which the penalty has been levied. I have gone through the cases and nowhere has it been held that penalty should be levied on each and every addition retained by the department. We are now submitting the following case laws and submissions directly on the issue that no penalty should be levied in cases where claim of depreciation has not been allowed in full.

*In this regard, the decision of Hon'ble Supreme Court in the case of **M/s Flexituff International Ltd. order dated 04.05.2010** may be referred to. The Hon'ble Court has decided that imposition penalty u/s 271(1)(C), there must be definite finding that either there must be concealment of income or furnishing inaccurate particulars.*

1. *The admission or rejection of a claim is a subjective exercise and whether a claim is accepted or rejected has nothing to do with furnishing of inaccurate particular of income or conceal income.*

What is a correct claim and what is an incorrect claim is a matter of opinion. Raising a claim, even if it is ultimately found to be legally unacceptable, cannot amount to furnishing of inaccurate particulars of income.

Mere making of the claim, which is not sustainable in law, by itself, will not amount to conceal or furnishing inaccurate particulars regarding income of the assessee.

This thought has now been confirmed by the Hon'ble Supreme Court in the case of CIT Vs Reliance Petro Product Pvt Ltd fcOlOl 322 ITR 158 (SC).

Under these circumstances, the addition accepted being bona fide, there is no concealment of income and as such no penalty u/s 271(1)(C) is leviable.

2. *The disallowance of depreciation will not perse amount to furnishing inaccurate particulars for which reliance is placed in **CIT Vs Aiaib Singh & Com (253 ITR 630) (P&H)**. Where no information, given in the return, is found to be incorrect or inaccurate, the assessee can not be held guilty of furnishing*

inaccurate particulars.

3. *Hon'ble Apex Court in the case of Dilip N. Shroff Vs JCIT (291 ITR 519){SC) and Union of India Vs Dharmendra Textiles Processors (306 ITR 277HSC) clearly held that merely because assessee claimed expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not attract penalty u/s 271(l)(c).*

4. *In the decision of Hon'ble ITAT, Indore Bench-Indore in the case of M/s Kalani Industries Pvt Ltd Vs DCIT-1(l) Indore (ITA No. 29/Ind/2009) dated 21/04/2011. In which Hon'ble ITAT has described the word "Conceal" as under:*

" The expression "has concealed the particulars of income" and "has furnished inaccurate particulars of income" have not been defined either in sec. 271(l)(c) or elsewhere in the Act. One thing is certain that these two circumstances are not identical in details although they may lead to same effect, namely, keeping of a certain portion of income. The former is direct and the later may be indirect in its execution. The word "conceal" is derived from the Latin word "concolare" which implies to hide. In the present appeal, even if a excess depreciation has been claimed by the assessee on the basis of the Companies Act does not mean that the assessee had hidden something, therefore, even if a wrong claim is made, automatically, does not tantamount to furnishing inaccurate particulars. Concealment refers to a deliberate act on the part of the assessee. The primary burden of proof is on the Revenue, before a penalty is imposed u/s 271(l)(c) because by no stretch of imagination, making a incorrect claim, does not tantamount to furnishing inaccurate particulars, therefore, keeping in view the totality of facts and the judicial pronouncements, that too from the Hon'ble Apex Court, no penalty is leviable especially when there is no finding that any details supplied by the assessee in its return is erroneous or incorrect, therefore, mere making a excess claim in itself does not invite imposition of penalty u/s 271(l)(c) because the same cannot amount to furnishing inaccurate particulars. "

We are also enclosing case laws directly related to our case where it has been held that no penalty should be levied in the facts and circumstances of our case.:-

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| 1. <i>CIT v. P J Chemicals Ltd.</i> | <i>Page 13-14</i> |
| 2. <i>CIT v. Jawahar Lal Gupta and Ashutosh Mohunta, JJ</i> | <i>Page 15</i> |
| 3. <i>Dilip N Shroff v. JCIT, Special range, Mumbai</i> | <i>Page 16</i> |
| 4. <i>T. Ashok Pai v. CIT, Bangalore</i> | <i>Page 17</i> |
| 5. <i>CIT v. Mahabaleshwar Gas & Chemicals (P) Ltd.</i> | <i>Page 18-19</i> |
| 6. <i>Price Waterhouse Coopers (P) Ltd. v. CIT, Kolkata-I</i> | <i>Page 20</i> |

7. *CIT, Ahmedabad v. Reliance Petroproducts (P) Ltd.* Page 21-23
8. *M/s. Exensys Software Solutions v. Department of Income Tax* Page 24
9. *ACIT v. Hotel Dan Private Limited* Page 28
10. *DCIT, Circle 11(1) v. M/s. Speciality Food India (P) Ltd.* Page 30
11. *JCIT v. Super Cassetes Industries* Page 32
12. *Sayaji Iron & Engg Co. v. CIT* Page 33”

6. On the other hand, the ld. DR relied on the order of the lower authorities and he further submitted that the assessee has wrongly claimed depreciation on the fixed assets which is not as per section 43(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act). Had it not been taken up for scrutiny, the assessee would have escaped. The assessee has admitted the factual position in the quantum proceedings before the CIT(A) that the capital subsidy should have been deducted from the cost of plant and machinery installed during the year. Therefore, there is a clear cut mala fide intention of the assessee to conceal the income. The case laws relied by the ld. AR are not applicable in present case due to fact of the assessee's case are different.

7. We have considered the rival submissions of the parties and have gone through the entire material available on record including the case laws relied by the assessee. It is not in dispute that the assessee has declared the total value of fixed assets (Plants & Machinery) in its books of accounts. It is also not in dispute that the capital subsidy received by the assessee under TUFF scheme of Gujrat Government was also declared by the assessee before the AO in the assessment proceedings. The only lapse on the part of the assessee unearthed by the AO in the assessment proceedings was that instead of deducting the cost of fixed assets by the amount of capital subsidy received from the Govt., the assessee had shown it as part of reserves in the balance sheet and for this lapse, the AO had already disallowed the excess

depreciation claimed. These facts, however, nowhere go to suggest that the assessee had furnished the inaccurate particulars to attract penalty u/s. 271(1)(c) of the Act. Had the assessee not declared the capital subsidy received and claimed the depreciation on full value of capital assets, the matter would have been different. However, once all the information were given in the return of income accompanied by relevant books maintained by assessee, in our considered opinion, simple disallowance of depreciation will not amount to furnishing of inaccurate particulars, as held by Hon'ble Punjab & Haryana High court in the case of CIT vs. Ajaib Singh & Co., 253 ITR 630 and other several decisions relied by the assessee before us including CIT vs. Reliance Petroproducts Pvt. Ltd., 322 ITR 158 (SC). In view of this, we are not inclined to sustain the order of the Id. CIT(A). As a result, the appeal of the assessee is found to have merit and deserves to be allowed.

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

Order pronounced in the open court on 15th March, 2017.

Sd/-

Sd/-

(BHAVNESH SAINI)
JUDICIAL MEMBER

Date: 15.03.2018

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copy of order to: -

- 1) The Appellant;
 - 2) The Respondent;
 - 3) The CIT;
 - 4) The CIT(A)-, New Delhi;
 - 5) The DR, I.T.A.T., New Delhi;
- True Copy

(L.P.SAHU)
ACCOUNTANT MEMBER

By Order
ITAT, New Delhi

S.No.	Details	Date
1	Draft dictated on	13.03.2018
2	Draft placed before author	13.03.2018
3	Draft proposed & placed before the Second Member	
4	Draft discussed/approved by Second Member	
5	Approved Draft comes to the Sr. PS/PS	
6	Kept for pronouncement on	15.03.2018
7	File sent to Bench Clerk	
8	Date on which the file goes to the Head Clerk	
9	Date on which file goes to the A.R.	
10	Date of Dispatch of order	

