आयकर अपीलीय अधिकरण "ई" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI JOGINDER SINGH, JM AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 8125/Mum/2010
(**निर्धारण वर्ष /** Assessment Year: 2003-04)

Trans Polyurethane Pvt. Ltd. 27A, Laxmi Indl. Estate, Off. Link Road, Andheri (W), Mumbai-400 053	**बनाम**/ Vs.	Dy. CIT, Range-8(3), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACT 6526 H		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Rakesh Joshi
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Neil Philip

सुनवाई की तारीख / **Date of Hearing**	:	12.01.2015
घोषणा की तारीख / **Date of Pronouncement**	:	25.03.2015

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee agitating the confirmation of the levy of penalty u/s. 271(1)(c) of the Income Tax Act, 1961 ('the Act' hereinafter) by the Order by the Commissioner of Income Tax (Appeals)-18, Mumbai ('CIT(A)' for short) dated 11.10.2010, for the assessment year (A.Y.) 2003-04.

2. The facts of the case are that the assessee-company, in the business of manufacture of insulation panels and distribution of ice cream, returned its income for the year on 01.12.2003 at a loss of Rs.374.48 lacs. The assessee was during the course of assessment proceedings called upon to, i.e., vide notice u/s.142(1) dated 27.09.2005, justify its claim

for interest, made in the sum of Rs.2,73,95,100/-, specifically requiring the details of the payments made, in-as-much as interest to bank is among the sums specified in section 43B, so that its deduction is subject to payment. The assessee, in response, filed a revised computation of income on 09.02.2006, disallowing its interest claim afore-said. It was further explained that as its records and factory were in the possession of the bank, it could not be ascertained as to how much of the amount recovered by the bank had been appropriated by it against the interest and, consequently, how much of interest is unpaid. In the absence of the relevant evidence, i.e., to substantiate its said claim, the entire interest, as claimed was disallowed, and the assessment framed effecting the said disallowance vide order u/s.143(3) dated 20.02.2006 (copy on record), also initiating the penalty proceedings u/s.271(1)(c) by issue of notice u/s.274 of even date. The assessee pleaded its' case before the Revenue on the same basis, i.e., of it being constrained for want of information as to the extent of the bank liability outstanding, which fact had been in fact mentioned in the tax audit report as well. The company was in fact a sick company, registered with BIFR, reporting no profit even in the subsequent years. There was as such no loss of revenue, and the charge of evasion of tax thus does not stick. The company had in fact made a one-time settlement (OTS) with its bank, DCB, offering the gain on OTS, at Rs.926.30 lacs, to tax for A.Y. 2006-07. The same not finding favour with the Revenue, the assessee is in second appeal before us.

Before us, the assessee's principal contention was that while the impugned interest comprised interest on both term loan and cash credit to its bank (DCB), only the interest on the term loan qualifies as a specified sum u/s. 43B, so that its allowance alone would be subject to payment. The substitution of the words 'term loan' by the words 'loans or advances' in section 43B(e) was done only by Finance Act, 2003 w.e.f. 01.04.2004, so that it would impact only assessments A.Y. 2004-05 onwards. The A.O., in fact, ought to have factored the same and made only a proportionate disallowance of interest, i.e., rather than for the entire amount of Rs.273.95 lacs, making a suggestive calculation based on the balance outstanding in the two accounts, i.e., term loan and cash credit, by applying the average interest rate, determined at 19.10% p.a., which it contended was in fact

incumbent on the A.O. to do in view of the Board's Circular No. 14-XL-35 dated 11.04.1955. Further on, inadvertent mistake should not warrant penalty, relying for the purpose on the decision in *Price Waterhouse Coopers (P.) Ltd. v. CIT* [2012] 348 ITR 306 (SC), besides on others by the Tribunal.

The ld. Departmental Representative (DR), on the other hand, would submit that the question of a mistake does not arise in the present case in-as-much as the assessee itself concedes to being constrained for want of the relevant information, i.e., the payment appropriated by its bank, and which it has been unable to exhibit.

3. We have heard the parties, and perused the material on record.

The assessee's case rests on its' claim being an inadvertent mistake, and which stood corrected in the first instance. However, as pointed out by the Revenue authorities, the same cannot be said to be voluntary, but only on the Revenue making a specific enquiry in the matter. Further, the assessee's contention of being constrained for want of necessary or relevant information is without substantiation. Why would not the bank give or share the relevant information with the assessee, who responded almost immediately during the assessment proceedings, i.e., vide written submissions dated 31.01.2006, followed by the revised computation, effecting disallowance of interest, on 09.02.2006. It would rather be a contradiction in terms to suggest that while the assessee is in the know of the amount of the interest charged by the bank for the year, and for both its accounts, duly reflected as interest accrued and due in its balance-sheet as at the relevant year-end, it does not know if, or to the extent, the same is paid up. All it was required to do was to issue a letter to the bank seeking the said information, i.e., even if, which again has not been shown, the payment/s stood realized by the bank directly, i.e., on disposal of the assets under its charge. In fact, the same could be readily shown in-as-much as the assessee, having booked the entire interest on both the accounts, which is only routed through the said accounts, non-payment of interest would lead to a corresponding difference in the bank balance/s, i.e., with reference to that reflected per the books of the

bank, so that the assessee has, by implication, not reconciled its bank account/s with the bank. Even this, however, has not been shown.

Further still, the assessee is a regular assessee, well serviced by tax and audit professionals. The latter issuing a disclaimer for being unable to state the amount disallowable u/s.43B in the absence of the relevant information, defeats its case of it being an inadvertent mistake. *On what basis, then, one may ask, was the deduction claimed*? The only course, in the absence of the information, was that the assessee seek leave to revise its' return, which the law even otherwise extends, i.e., where subsequently it discovers a claim as arising in the facts of its case. A legal claim, in fact, could be pressed at any stage of the assessment proceedings.

The assessee's plea of no loss to the Revenue is of no consequence in view of the clear provision of law defining the term 'tax sought to be evaded', under *Explanation* 4 thereto, and with reference to which the penalty is to be levied, and for which reference stands made by the ld. CIT(A), and only rightly so, to the decisions in *CIT v. Gold Coin Health Foods (P.) Ltd*. [2008] 304 ITR 308 (SC) and *Union of India v. Dharmendra Textile Processors* [2008] 306 ITR 277 (SC).

The assessee, thus, as apparent, has no valid basis in making a claim for bank interest, made at Rs.273.95 lacs, i.e., to the extent covered by section 43B. That is to say that the assessee could not substantiate its claim of it being based either on any material or even as arising on account of a *bona fide* mistake, validating the charge of penalty in terms of *Explanation* 1 to section 271(1)(c). Income to that extent, but for its' scrutiny by the Revenue, would have escaped assessment. The decision in the case of *Price Waterhouse Coopers (P.) Ltd.* (supra) is inapplicable in the facts and circumstances of the case. We, accordingly, confirm the penalty thereon, levied at the minimum rate of 100% of the corresponding tax sought to be evaded, to that extent, so that no penalty could be levied on the interest attributable to the cash credit account, which the A.O. shall verify to his satisfaction, excluding also the interest paid, if any, on the term loan up to the due date of the filing the return, which again the A.O. shall verify. We decide accordingly, and the assessee succeeds partly.

4. In the result, the assessee's appeal is partly allowed.
परिणामतः निर्धारिती की अपील आंशिक स्वीकृत की जाती है ।

Order pronounced in the open court on March 25, 2015

Sd/-	Sd/-
(Joginder Singh)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 25.03.2015

व.नि.स./Roshani, Sr. PS

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

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

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**