IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'G' : NEW DELHI)

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
and
SHRI A.T. VARKEY, JUDICIAL MEMBER

ITA No.5770/Del./2013
(ASSESSMENT YEAR : 2002-03)

M/s. Snowhite Stores Pvt. Ltd., G – 16, NDSE Part I, New Delhi.	vs.	ACIT, Circle 9 (1), New Delhi.

(PAN : AAACS0103P)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : S/Shri Pradeep Dinodia & R.K. Kapoor, Advocates
REVENUE BY : Shri K.K. Jaiswal, Senior DR

Date of Hearing : 09.11.2015
Date of Pronouncement : 11.12.2015

O R D E R

PER A.T. VARKEY, JUDICIAL MEMBER :

This appeal, at the instance of the assessee, is filed against the order of the CIT (Appeals)-XII, New Delhi dated 09.08.2013 for the assessment year 2002-03.

2. The only ground taken by the assessee is against the sustenance of levy of penalty of Rs.4,82,120/- u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter 'the Act').

3. The assessment in this case was completed u/s 143(3) of the Act on 23.03.2005 at an income of Rs.41,80,350/- after making the following additions :-

(i)	Delayed payments of PF Contributions	Rs. 96,436/-
(ii)	Provision for leave encashment	Rs. 88,230/-
(iii)	Difference in creditors balance	Rs.1,57,911/-
(iv)	Difference in stock	Rs.12,62,256/-

Aggrieved by the aforesaid additions, the assessee went in appeal before the ld. CIT (A) who has confirmed the additions of Rs.88,230/- on account of provision for leave encashment and Rs.12,62,256/- on account of difference in stock.

3.1 The AO initiated the penalty proceedings u/s 271(1)(c) of the Act in respect of the alleged concealment in respect of aforesaid two additions confirmed by the ld. CIT (A). The AO issued show cause notices on 02.03.2012 and 06.03.2012 and pursuant to that, the assessee replied by filing submissions along with various judicial pronouncements. After considering the submissions of the assessee, the AO was of the opinion that the assessee had furnished inaccurate particulars of income and concealed income on account of provision for leave encashment and on account of difference in stock with the intention to evade tax; and accordingly, levied the penalty of Rs.4,82,120 @ 100% u/s 271(1)(c) of the Act.

3.2. Aggrieved, the assessee filed an appeal before the first appellate authority and the ld. CIT (A) confirmed the levy of penalty by observing as under :-

> " I have considered the grounds raised in appeal and the facts of the case as well as the submission filed by the AR of the appellant. On the issue of provision for earned leave it is apparent that in earlier years the provision was allowable as ascertained liability. However from A.Y. 2002-03, as per proviso (f) 43B the expenditure on earned leave is allowable on payment basis. In the instant case there was no claim against the provision and none for earlier years. Apparently the appellant fail to establish the nexus between the payment and the provisions made earlier or during the current year. This led to distorted picture of profits leading to liability to penal provisions of the Act.
>
> On the issue of difference in the value of closing stock as per the books of accounts and statements submitted to banks, the appellant failed to apply a uniform method of valuation of closing stock and furnished inaccurate particulars leading to concealment of income. The case laws relied upon by the appellant are distinguishable on facts. On both the issues the appellant is liable to levy of penalty u/s 271(1)(c) of the Act, which is correctly levied by the Assessing Officer. Grounds raised in appeal are dismissed."

4. Ld. AR reiterated the submissions made before the ld. CIT (A) and submitted that the penalty was levied on account of two additions i.e. provision for leave encashment and difference in stocks sustained by the ld. CIT (A) in the quantum assessment. As regards the provision for leave encashment, the ld. AR submitted that the AO noted that Rs.88230/- was outstanding on account of provision for leave encashment at the close of the year i.e. 31.03.2002, however, it was explained that this provision for leave encashment has been made in the earlier years and since the amount represented unclaimed earned leave, for which no claim has been made till 31.03.2002, therefore, the amendment made under section 43B(f) w.e.f.

01.04.2002 i.e. applicable from A.Y. 2002-03 and that did not apply to the provision for leave encashment, which was pertaining to earlier years. He further submitted that no amount was debited in the Profit & Loss Account as an expense. He pointed out that the CIT (A) confirmed the disallowance in a summary manner without appreciating the fact that the provision for leave encashment was allowable as an ascertained liability and these provisions were pertaining to the earlier years; and it was only from AY 2002-03 that such provision was subject to provision of section 43B(f) of the Act. In this regard, he made a specific reference to the decision of the Hon'ble Supreme Court in the case of Bharat Earthmovers vs. CIT - 245 ITR 428 to claim that the disallowance itself was bad and, therefore, no penalty should have been levied on the same. He further mentioned that Hon'ble Calcutta High Court in the case of Exide Industries Ltd. vs. Union of India, 292 ITR 470, has held that the amendment to section 43B(f) is unconstitutional and the Hon'ble High Court has held that provision for leave encashment is an allowable expenditure. Ld. AR submitted that the ITAT, Ahmedabad Bench in EIMCO Elecon (India) Ltd. vs. Addl. CIT (2013) 22 ITR (Trib) 380 (Ahmedbad) has held that disallowance u/s. 43B cannot be made on account of provision for leave encashment, in view of the judgment of the Hon'ble Calcutta High Court in the case of Exide Industries Ltd. (supra). He further submitted that the Department has filed SLP against the said decision of the Hon'ble Calcutta

High Court and the same is pending in the Hon'ble Supreme Court. Ld. AR pointed out that whatever may be the outcome of such SLP, the facts narrated above would establish that the issue is highly debatable and the disallowance itself was not made on the sound legal footing and if the assessee has contested this issue in the further appeal, it might have succeeded. Ld. AR submitted that just because the assessee did not prefer to file an appeal against the order of the CIT (A) in quantum appeal, the levy of penalty on such a highly debatable issue is grossly wrong and is not permissible, as it is a settled law that no penalty can be levied on a debatable point of law, as already clarified in many judgments and he made a reference to the following judicial pronouncements:

- Devsons Pvt. Ltd. vs. CIT [2010] 329 ITR 483 (Del)
- CIT vs. Reliance Petroproducts Pvt. Ltd., 322 ITR 158 (SC)
- CIT vs. Hindustan Computers Ltd. [2010] 322 ITR 88 (All.)
- Karan Raghav Exports P. Ltd. vs. CIT, 349 ITR 112 (Del)
- CIT v. Mahavir Irrigation Pvt. Ltd., 347 ITR 241 (Del)

4.1 As regards the difference in stock valuation, the details submitted to the bank are valued at MRP for some of the items, whereas the valuation of stocks as per books of accounts were done on the basis of regularly followed method of accounting i.e. 'cost or market value whichever is lower'. He submitted that in the quantum proceedings before the CIT(A), it was explained that the G.P. ratio of the assessee was about 8%, which was also the

difference in the valuation declared to the bank and the valuation of stocks shown in the books of accounts. In this regard, the ld. AR submitted a chart in the written submission which is reproduced below :-

Particulars	Inventory as on 31.3.2002	A. Y. 2002-03	A.Y.2001-02
Sales/Inventory as per bank	1,66,80,106/-	9,60,86,764/-	11,03,44,792/-
Cost/inventory as per books	1,54,17,850/-	8,76,30,058/-	10,00,48,508/-
Gross Profit/ Difference	12,62,256/-	84,56,796/-	1,02,96,284/-
GP ratio	7.56%	8.80%	9.33%

He submitted that the assessee opted not to file any appeal against both the additions because of earlier years brought forward the huge unabsorbed losses and the same is clear from the assessment order; and even after all the additions were taken into account, the assessee still had carried forward losses of about Rs.1.3 crores, which were available for adjustment and the assessee made a specific submission that assessee had no hope of adjusting such huge brought forward losses in foreseeable future. He further submitted that in any case, if stock valuation was to be pegged up by the addition in this year, the same was required to be added to the opening stock of the next year and the addition on account of stocks is always revenue neutral. He submitted that various judgments had been given by the assessee before the ld. CIT (A) which has been recorded in the order by the ld. CIT (A) but he conveniently ignored the same. The Ld. AR took our attention to Hon'ble Allahabad High Court decision in the case of CIT vs Hindustan Computer Ltd. (2010-322 ITR

88 Allahabad) where in the penalty levied on account of unaccounted stock was deleted by the Tribunal was up held. The Ld. AR also took our attention to a similar case CIT Vs Das Industries 303ITR199Allahabad, wherein also the Hon'ble High Court of Allahabad has upheld the order of the Tribunal deleting the addition made on the basis in flatted stock shown before the bank to avail higher loan. He further submitted that as against the judgment of the Gauhati High Court, which was followed by the AO and CIT(A), there are many other Hon'ble High Courts' decisions which have consistently held that no addition can be made merely on the basis of difference in stocks as per books of accounts and as submitted to the bank for obtaining loan, because it is a normal practice by the businessman to disclose higher valuation of stocks to the bank for availing credit limits. In this regard, he relied on various judgments which were recorded by the ld. CIT (A) on page 6 of the penalty order.

4.2 In view of the above submissions, the ld. AR submitted that in any event, there is no case of levying penalty on the assessee, as on the peculiar facts, both the issues are highly debatable in law and assessee cannot be said to have either furnished inaccurate particulars or concealed particulars of its income in respect of any of the items of additions. Merely because the assessee has accepted additions, which does not ipso facto lead to an inference that the assessee has committed default within the meaning and

context of section 271(1)(c) of the Act, therefore, the ld. AR prayed that the penalty levied on the assessee by the AO and upheld by the CIT(A) by ignoring the principles of law by the judicial bodies may be deleted.

5. On the other hand, the ld. DR relied on the orders of the authorities below and submitted that the assessee had not filed any appeal against the sustenance of the additions against which the penalty was levied. He, therefore, wants us not to interfere with the orders of the lower authorities and the same may be upheld.

6. We have heard both the parties and perused the records. We find that on the issue of provision for earned leave it is apparent that in the earlier years, the provision was allowable as ascertained liability. However, from A.Y. 2002-03, as per proviso (f) of section 43B, the expenditure on earned leave is allowable on payment basis. The Hon'ble Supreme Court in the case of Bharat Earthmovers vs. CIT - 245 ITR 428 held that the provision for earned leave is a right claim and that the disallowance itself was bad and, therefore, no penalty should have been levied on the same. Mr. Pardeep Dinodia, the Ld. AR took our attention to the decision rendered by Hon'ble Calcutta High Court in the case of Exide Industries Ltd. vs. Union of India, 292 ITR 470, where in it was held that the amendment to section 43B(f) is unconstitutional and the Hon'ble High Court has held that provision for leave encashment is an allowable expenditure So we find force in the submission

of the assessee that the disallowance on the issue of provision for earned leave is highly debatable and more over when the amendment in law was applicable for the first time and applicable from this relevant assessment year; and the proviso (f) of section 43B, has been struck down by the Hon'ble Calcutta High Court, cannot be the ground to levy penalty on the assessee. Likewise, difference in stock pricing is Revenue neutral and there was no physical verification done by the AO in respect to the stocks, merely because there is difference in stock valuation submitted by the assessee to the bank, the impugned addition in quantum proceedings itself would stick is doubtful; simply because the assessee did not prefer to file appeal in quantum further before the Tribunal, cannot go against the assessee. Relying on the decision of Hon'ble Allahabad High Court in of CIT vs Hindustan Computer Ltd. (2010-322 ITR 88 (Allahabad) and CIT Vs Das Industries 303 ITR199(Allahabad), difference in stock valuation cannot be the ground to levy penalty on the assessee, so it is ordered to be deleted. Accordingly, the ground taken by the assessee is allowed.

7. In the result, the appeal of the assessee stands allowed.

Order pronounced in open court on this 11th day of December, 2015.

Sd/-	**sd/-**
(N.K. SAINI)	**(A.T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 11th day of December, 2015/TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)-XII, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.