

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ 'बी', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI

**BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJIT SINGH, JM**

आयकर अपील सं./ITA No.5652&7013/Mum/2004

(निर्धारण वर्ष / Assessment Year : 1993-1994 & 1994-1995)

M/s Kotak Mahindra Bank Limited, 36-38A, Nariman Bhavan, 227 Nariman Point, Mumbai-400021	Vs.	DCIT, Central Circle-5, Mumbai-400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA No.5332/Mum/2008

(निर्धारण वर्ष / Assessment Year : 1993-1994)

DCIT-3(2) Mumbai-400020	Vs.	M/s Kotak Mahindra Bank Limited, 36-38A, Nariman Bhavan, 227 Nariman Point, Mumbai-400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Madhur Agrawal
& Chetan Kakka

राजस्व की ओर से /Revenue by : Shri Rajiv Pant

सुनवाई की तारीख / Date of Hearing : 03/11/2015

घोषणा की तारीख/Date of Pronouncement 28/03/2016

आदेश / O R D E R

PER R.C.SHARMA (A.M):

ITA No.5652&7013/Mum/2004(Assessee's Appeal)

These are the appeals filed by assessee against the order of CIT(A), Mumbai, for the assessment years 1993-94 & 1994-95, in the matter of order passed u/s.143(3) r.w.s.147 and 143(3) of I.T.Act.

2. In both these appeals, the assessee is aggrieved against the order of CIT(A) in declining assessee's claim for depreciation on bio-gas plant.

3. We have heard rival contentions and found from record that the regular assessment for A.Y.1993-1994 was originally completed u/s.143(3) on 15th March, 1995 by the DCIT, Special Range-25, Mumbai assessing the total income of Rs.7,50,06,550/-. The assessment was reopened under section 147 based on the investigation report dated 11th November 1996 from the office of the Additional Director of Income Tax (Inv.) Pune. During the previous year 1992-93 corresponding to assessment year 1993-94, the assessee entered into three lease transactions with Western Paques India Ltd. (WPIL). The assets leased in question were 3 bio gas pilot plants. The details are as under :-

Lease Agreement No	Lease Date	Cost-Rs.	Site at which the Bio Gas Plant located
1097/93	16.03.1993	50 lakhs	Niphad S.S.K.Ltd.
1097/93	16.03.1993	50 lakhs	Daulat S.S.K.Ltd.
1110/93	03.02.1993	50 lakhs	Satara S.S.K.Ltd.

All the lease transactions were for tenure of 36 months. In the reassessment order, the AO disallowed depreciation on the above three bio gas plant on the ground that the assets were not in existence.

4. By the impugned order, the CIT(A) confirmed the reopening as well as disallowance of claim of depreciation. For the years under consideration the assessee is aggrieved for decline of claim of depreciation as well as validity of reopening for the assessment year 1993-94.

5. It was argued by Id. AR that the CIT(A) erred in confirming the reopening proceedings u/s. 147 without having any reason to believe that any income chargeable to tax has escaped assessment. As per Id. AR complete details of the lease transactions were already submitted during the course of original assessment proceedings and on the basis of which the depreciation was allowed. There was no sufficient evidence / proof available before the AO to draw a reasonable opinion that income had indeed escaped assessment. Id. AR invited our attention to the fact that the entire investigation report relied upon by the AO is based on statements and oral submissions of persons who are not even connected with the lease transaction between M/s. Western Paques India Limited (WPIL) and the assessee. It was further argued by Id. AR that the alleged non committal response of the WPIL representative in his statement dated 5-2-1996 has been stated selectively and out of context. It was further argued by Id. AR that the statement recorded by the AO on 21-2-1997 (and cited at page 11 of the assessment order) relates to the lease transactions of F. Y. 1993-94 (A. Y. 1994-95), which clearly shows a hastily drawn opinion and / or conclusion regarding income escaping assessment in the Appellant's case for A. Y. 1993-94.

6. In view of the above it was contended that the entire assessment proceedings be declared bad in law and therefore be quashed.

7. On merit it was argued by Id. AR that the CIT(A) erred in disallowing the depreciation aggregating to Rs.25,00,000/-in respect of Bio Gas Pilot Plant located at Niphad S5.K. Ltd leased to M/s. Western Paques India

Limited (WPIL) on the ground that the assets are not in existence. It was contended that documentary evidence clearly establishes the physical existence of the bio gas pilot plant, especially during the year in which the asset was purchased and leased to WPIL i.e. Financial Year 1992-93. Our attention was also invited to the fact that the lessee, namely WPIL has also confirmed the sale of the new bio gas plant to the assessee, which has been duly accounted by them as income, a fact duly confirmed by them before ADIT, Pune. Ld. AR further contended that the statement of Shri. Shantaram Laxman Satbhai, MD of Niphad cannot be relied upon for establishing the fact that no bio gas pilot was installed during the FY 1992-93, because vide his own subsequent letter dated 4.6.96, he has confirmed existence of bio gas plants during the period September 1991 to October 1994. The existence of bio-gas pilot plants cannot be denied in view of the fact that subsequently in October 1993, an order for purchase of the main bio-gas plant was placed by Niphad SSK Ltd. with WPIL. Ld. AR vehemently argued that the response of the AO of IDBI dated 14.2.1997 has not been appreciated in its true perspective because the conclusions drawn by the AO seem to be premature and in haste. Having submitted a detailed explanation regarding this lease transaction vide letter dated 25.3.1997, the AO refused the appellant's request for an opportunity of being heard again and instead the assessment was completed in haste i.e. within 1 month of the reopening of the assessment and in disregard of the principles of natural justice.

8. With regard to bio gas plant located at Satara, it was argued by Id. AR that the CIT(A) erred in disallowing the depreciation amounting to Rs.25,00,000/-in respect of Bio Gas Pilot Plant located at Satara S.s.K. Ltd leased to M/s. Western Paques India Limited on the ground that the assets are not in existence. Documentary evidence clearly establishes the physical existence of the bio gas pilot plant, especially during the year in which the asset was purchased and leased to WPIL i.e. Financial Year 1992-93. No statement on oath has been recorded of any person while conducting the enquiry regarding the existence of the bio gas plant. The Site Report No.31 clearly shows that no spot verification of the bio gas plant appears to have been conducted by the department. As per Id. AR the letter dated 19.2.96 from the MD of Satara SSK Ltd., on the basis of which the AO has denied depreciation to the appellant cannot be relied upon because in the said letter he has denied, Satara SSK Ltd. ever considering WPIL's proposal for setting up a bio-gas plant while at the same time vide his own earlier letter dated 31.1.94 addressed to WPIL has referred to a Board Meeting of Satara SSK Ltd. held on 31.1.94 accepting a proposal for energy generation from distillery spent wash. Having submitted a detailed explanation regarding this lease transaction vide letter dated 25.3.1997, the AO refused the appellant's request for an opportunity of being heard again and instead the assessment was completed in haste i.e. within 1 month of the reopening of the assessment and in disregard of the principles of natural justice.

9. With regard to decline of claim of depreciation in respect of Bio Gas Pilot Plant, located at Daulat S.S.K.Ltd., it was submitted by Id. AR that CIT(A) erred in disallowing the depreciation amounting to Rs.25,00,000/- in respect of Bio Gas Pilot Plant located at Daulat S.S.K. Ltd leased to M/s. Western Paques India Limited (WPIL) on the ground that the assets are not in existence. Documentary evidence clearly establishes the physical existence of the bio gas pilot plant, especially during the year in which the asset was purchased and leased to WPIL i.e. Financial Year 1992-93. The lessee, namely WPIL has also confirmed the sale of the new bio gas plant to the Appellant, which has been duly accounted by them as income. The physical existence of the Bio-gas pilot plant is further proved in the form of test reports of spent wash treatment relating to WPIL's Daulat SSK Ltd site, during the relevant period. The statements of Shri Gopal Vittal Kulkarni and Shri Gopalrao Motirao Patil have no relevance and / or cannot be relied upon for the reason that their replies stating that Daulat SSK Ltd. has not awarded any type of work for supply of inter alia pilot plants to WPIL and that there is no correspondence made with them, are false and inconsistent with the contents of letter dated 30.11.91 from Daulat SSK Ltd. to WPIL which clearly states that Daulat SSK Ltd. was pleased to place work order on WPIL for conducting the pilot plant studies and also agreed to provide the necessary infrastructure at free of cost to WPIL. Id. AR also placed on record order of the coordinate Bench in case of Monoplan Securities, ITA

No.5501/Mum/2008, order dated 1-9-2014, wherein claim of depreciation in respect of bio-gas plant leased to M/s Western Pacques, was allowed.

10. On the other hand, Id. DR relied on the orders of the authorities below and contended that the AO was correct in declining assessee's claim for depreciation on the Bio Gas Plant.

11. We have considered rival contentions and carefully gone through the orders of the authorities below and found from the record that there was sufficient reason to believe that there an escapement of income as per the findings recorded by the AO on the basis of investigation report dated 11-11-1996. Accordingly, we do not find any infirmity in reopening the concluded assessment.

12. With regard to the merit of addition we found that during the course of reassessment hearing following documentary evidences were filed in support of the lease transaction with WPIL:-

- a) Invoice
- b) Insurance Cover Note
- c) Installation Certificate
- d) Delivery challan dated 2.2.93 for dispatching pilot plant material from Shirwal R&D Centre to the Resident Engineer WPIL Co. Niphad SSK Ltd. Nasik
- e) Lorry receipt dated 2.2.93 Ref.GC Note 57 of Manohar Transport Services Pune
- f) Letter dated 4.11.91. Ref.:WPIL/DDS/92-1011 from WPIL to the MD Niphad SSK Ltd.
- g) Letter dated 11.2.93 Ref.WPIL/DDS/K-137 from WPIL to Niphad SSK Ltd.
- h) Letter dated 7.8.93 Ref.Lagoon/93-94/3930 from Niphad SSK Ltd to WPIL
- i) Certificate dated 4.6.96 issued by the MD of Niphad SSK Ltd.

The AO has however relied on the site inspection report compiled by the Pune ADIT wherein it was stated that no pilot plant was found on 9.2.96 by them. Further, they stated that the AO relied upon the statement of Shri Shantaram Laxman Satbhai, MD of Niphad SSK Ltd. which according to the AO confirmed the non-existence of a bio gas pilot plant after 1990 (i.e. "2 years starting from 1988"). Considering the documentary evidence mentioned above establishes the physical existence of the bi gas plant during the year in which the asset was purchased and leased to WPIL i.e. Financial Year 1992-93. The said bio gas pilot plant was dispatched to the Niphad SSK Ltd. site on 2.2.93 as evidenced by the delivery challan and the lorry receipt. This fact is also confirmed by the lessee viz. WPIL to the ADIT, Pune during the course of investigation. The statement of Shri Shantaram Laxman Satbhai, MD of Niphad also cannot be relied upon for establishing the fact that no bio gas pilot was installed during the FY 1992-93 because vide his own subsequent letter dated 4.6.96 he has confirmed existence of bio gas plants during the period September 1991 to October 1994. The existence of bio-gas pilot plants cannot be denied in view of the fact that subsequently in October 1993 an order for purchase of the main bio-gas plant was placed by Niphad SSK Ltd. with WPIL. Installation of bio-gas pilot plants is an integral part of the erection of the main plant, since the same are required to get the exact trading factors of the effluent for calibrating the main bio gas plant. We found that after reopening the AO completed assessment in haste even within a period of one month in disregard of the principles of natural justice.

13. In view of the available documentary evidence; the positive affirmation made by WPIL, the lessee who is a party to the lease transaction, regarding the existence of the bio gas pilot plant; the inconsistent statements made by the MD of Niphad SSK Ltd and the incomplete inquiry in the case of IDBI, about the ownership of the bio gas plant, non-existence of bio-gas plant especially during F.Y.1992-93 was not conclusively proved by lower authorities.

14. In view of the above discussion and keeping in view the totality of facts and circumstances of the case, we set aside the orders of both the lower authorities and the matter is restored back to the file of AO for deciding afresh considering the documentary evidences discussed above and after giving due opportunity to the assessee.

15. In the result, both the appeals of the assessee are allowed for statistical purposes.

ITA No.5332/Mum/2008(Revenue's Appeal)

16. This is an appeal filed by the revenue against the order of CIT(A) for the assessment year 1993-1994 in the matter of penalty imposed u/s.271(1)(c) of the Act.

17. The penalty has been imposed for decline of claim of depreciation. By the impugned order the CIT(A) deleted the penalty after observing as under :-

10.5 The main contention of the Assessing Officer here is that appellant has not brought any new material or fresh evidence on record to substantiate or justify the claim of depreciation. The Assessing Officer has talked of the attitude of the assessee towards

statutory provisions. He has relied upon one decision of Punjab High Court that mere offering of explanation does not absolve the assessee from liability of penalty. However, in the order imposing penalty, the Assessing Officer has not talked as to why penalty is imposable. None of the facts of the matter has been discussed. Assessing Officer only says that assessee has committed a default but what is the nature of default has not been discussed at all. The Assessing Officer is silent on exactly which provisions of section 271 (1)(c), he is invoking to impose the penalty. This is not justified at all for imposition of penalty. In my view, Assessing Officer has not made out a case of what is the default committed and what is the provision of the Income-tax Act applicable in that default for imposing penalty. There is inadequate satisfaction of the Assessing Officer for imposition of penalty on facts also. I am satisfied that the evidences relied upon in the assessment proceedings are only indicative and do not go to establish non existence of pilot plants. In fact the evidence relied upon by appellant in the penalty proceedings, particularly, insurance documents which clearly mention existence of the plants at the sites, goes to establish the other way round. In such a situation, the confirmation of quantum addition is to my mind based upon a perception of preponderance of probabilities about existence or otherwise of the pilot plants. There is no conclusive deduction in the assessment order or in the first appellate order of quantum appeal. In such a situation, imposition of penalty is not justified and the same is deleted.”

18. We have considered rival contentions. Penalty has been imposed for decline of claim of depreciation. Even as per the decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Ltd. 322 ITR 158(SC), penalty cannot be imposed for decline of legal claim filed by the assessee, wherein the Hon'ble Supreme Court observed as under :-

“By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars of income, therefore, it must be shown that the conditions u/s.271(1)© of the Act exist before the penalty is imposed.”

19. In the case of C.I.T. v Atul Mohan Bindal, 317 I.T.R. 1 (S.C.), the Apex Court held that for applicability of section 271(1)(c) the conditions stated therein must exists. The conditions are that the assessee should have concealed the particulars of income or furnished inaccurate

particulars of such income before the penalty u/s 271 (1)(c) could be levied. This has been reiterated in a recent decision of the Apex Court in C.I.T. v Reliance Petro Products P. Ltd, 322 I.T.R. 158, wherein Hon'ble Apex Court interpreted the meaning of the expressions, "concealment", "inaccurate", and "particulars" used in clause (c) of section 271(1) and held that everything would depend upon the return of income filed because that was the only document where the assessee can furnish the particulars of income. The Apex Court held that when such particulars are found to be inaccurate the liability of penalty would arise. Reading the words "particulars" in conjunction with the word "inaccurate", the Apex Court held that they only mean that the details supplied in the return which were not accurate, not exact or correct, not according to truth or erroneous, and unless there is a finding that any details supplied by the assessee in the return were found to be incorrect or erroneous or false, there would be no question of inviting the penalty u/s 271(1)(c). The Apex Court further held that mere making of the claim which is not sustainable in law by itself will not amount to furnishing inaccurate particulars of income of the assessee, and such claim made In the return cannot amount to inaccurate particulars. The Apex Court held that if the assessee has furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of. income on its part, it was up to the authorities to accept its claim in the return or not. Merely because the claim was not accepted or was not acceptable to the revenue, that by

itself would not attract the penalty u/s.271(1)(c). The Apex Court went on to hold that if the contention of the revenue is accepted then in case of every return where the claim made is not acceptable by the AO for any reason, the assessee will invite penalty u/s.271 (1)(c). Detailed findings recorded by CIT(A) for deleting the penalty imposed are as per material on record, accordingly we do not find any reason to interfere in the order of CIT(A) deleting penalty so imposed.

20. In the result appeal of the revenue is dismissed.

Order pronounced in the open court on this 28/03/2016.

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 28/03/2016

प्र.कु.मि/pkm, नि.स/ 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), Mumbai.
4. आयकर आयुक्त / CIT
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
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai