

**आयकर अपीलीय अधिकरण “ई” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI**  
**BEFORE SHRI SANJAY ARORA, AM AND SHRI PAWAN SINGH, JM**

आयकर अपील सं./I.T.A. No. 7433/Mum/2013  
 (निर्धारण वर्ष / Assessment Year: 2006-07)

SBI DFHI Limited 23, 3 <sup>rd</sup> Floor, Voltas House, J. N. Heradia Marg, Bellard Estate, Mumbai-400 001	<b>बनाम/</b> Vs.	Asst. CIT, Range 2(1), Aayakar Bhavan, Churchgate, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACD 0532 B		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri Bhavin Shah
प्रत्यर्थी की ओर से/Respondent by	:	Shri Vachaspati Tripathi
सुनवाई की तारीख / Date of Hearing	:	02.6.2016
घोषणा की तारीख / Date of Pronouncement	:	30.6.2016

**आदेश / O R D E R**

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-4, Mumbai ('CIT(A)' for short) dated 15.10.2013, partly allowing the Assessee's appeal contesting its' assessment u/s.143(3) r/w s. 147 of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2006-07 vide order dated 23.11.2010.

2. The sole issue, agitated per four grounds by the assessee, as under, is the validity or otherwise in law of the levy of penalty u/s.271(1)(c) of the Act on the assessee's claim for unabsorbed depreciation (for Rs.41,68,938/-) in the computation of its' book profit u/s. 115 JB of the Act, at Rs. 4 lacs, i.e., at a little over 100% of the tax sought to be evaded thereon:

'1. The learned CIT(A) erred in confirming the penalty levied under Section 271(1)(c) of the Act by the learned Assessing Officer.

2. The learned CIT(A) erred in holding that the appellant has furnished inaccurate particulars of income in respect of excessive claim of depreciation which was not in accordance with the books of accounts maintained by the appellant as prescribed under Parts II and III of Schedule VI of the Companies Act.

3. The learned CIT(A) further erred stating that the appellant has accepted the decision and no further appeals pending on this matter and hence, it becomes an undisputed matter of furnishing inaccurate particulars of income.

4. The learned CIT(A) erred in observing that the appellant has excessively claimed depreciation knowing fully well that the helipad was never used for its business purposes in the initial year of its claim of depreciation.'

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

3.1 The relevant clause of *Explanation* 1 to section 115JB, where-under only the permitted adjustments to the profit (or loss) as per the profit and loss account, prepared in accordance with Part II and III of Schedule VI to the Companies Act, 1956 could be made, reads as under:

**'Special provision for payment of tax by certain companies.**

**115JB.** (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by

the assessee on such total income shall be the amount of income-tax at the rate of seven and one-half per cent.

(2) .....

*Explanation 1.*—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by—

(a) ....

(b) ...

(i) ....

if any amount referred to in clauses (a) to (i) is debited to the profit and loss account, and as reduced by-

(i) .....

(ii) .....

(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

*Explanation-* For the purposes of this clause,-

(a) the loss shall not include depreciation;

(b) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is nil; or”

3.2 We may next extract the relevant part of the assessee's profit and loss account, balance-sheet, and the directors' report (PB pages 20-21, 22, 9):

Profit and Loss Account  
For the year ended 31<sup>st</sup> March, 2006

	(Rs. Lacs)	
	2005-06	2004-05
Income	5,147.57	(3,685.42)
Expenditure	4,853.42	5,794.93
Profit (Loss) Before income tax	294.15	(9,480.35)
Less: Tax Expense		
Current Tax: Income Tax	(21.25)	0.00
: Fringe Benefit Tax	(2.12)	0.00
Deferred Tax	(26.70)	(76.33)
Profit/(Loss) after tax	244.08	(9,404.02)
Add :Provisions written back	1,556.72	0.00
Add (Less) : Excess/Short		

provision for Taxation of earlier years (net)		<u>20.17</u>		<u>0.00</u>
		1,820.97		(9,404.02)
Add: Balance in Profit & Loss A/c Brought Forward		<u>25,863.14</u>		<u>35,290.86</u>
Amount Available for Appropriation		<u>27,684.11</u>		<u>25,886.84</u>
Appropriation:				
Statutory Reserve	48.82		0.00	
Proposed Dividend	0.00		0.00	
Dividend Tax for Earlier Year	0.00		23.70	
General Reserve	0.00		0.00	
Balance carried to Balance Sheet	<u>27,635.29</u>		<u>25,863.14</u>	
		<u>27,684.11</u>		<u>25,886.84</u>
Basic and Diluted Earnings Per Share (Rupees)		0.84		(32.24)
(Refer Note 13 of Schedule 15)				
Significant Accounting Policies	14			
Notes to Accounts	15			

Schedules forming part of accounts  
As 31<sup>st</sup> March, 2006

(Rs. Lacs)

	As at 31.3.2006	As at 31.3.2005
Schedule 2		
Reserves and Surplus		
Statutory Reserve		
As per last Balance Sheet	22,108.82	22,108.82
Add: Amount transferred from Profit and Loss Account	<u>48.82</u>	<u>0.00</u>
	22,157.64	22,108.82
General Reserve		
As per last Balance Sheet	18,745.63	18,745.63
Add: Amount transferred from Profit & Loss Account	<u>0.00</u>	<u>0.00</u>
	18,745.63	18,745.63
Balance in Profit and Loss Account	<u>27,635.29</u>	<u>25,863.14</u>
	<u>68,538.56</u>	<u>66,17.59</u>

Director's Report

(Rupees in crore)

	Year ended March 31, 2006	Year ended March 31, 2005
Profit/(Loss) before depreciation and taxation	3.26	(94.38)
Less: Depreciation	(0.32)	0.42
Profit/(Loss) before taxation	2.94	(94.80)
Less: Provision for		
Income – tax	(0.21)	Nil
Fringe Benefit Tax	(0.02)	Nil
Add/(Less): Deferred Tax	(0.27)	0.76
Profit/(Loss) after depreciation and taxation	2.44	(94.04)
Add: Provisions written back	15.57	Nil
Add: Excess provision for taxation of earlier years (net)	0.20	Nil
Add: Balance in Profit & Loss A/c brought forward	258.63	352.91
Amount available for appropriation	276.84	258.87
Transfer to Statutory Reserve	0.49	Nil
Transfer to General Reserve	Nil	Nil
Proposed Dividend	Nil	Nil
Tax on Dividend	Nil	0.24*
<i>Balance in Profit &amp; Loss</i>		
<i>Account carried forward</i>	<u>276.35</u>	<u>258.63</u>
Earnings Per Share (Rs.)	0.84	(32.24)

(emphasis, ours)

On that basis, it is claimed that the lower of the unabsorbed depreciation (Rs. 0.42 cr.) and unabsorbed loss (Rs. 94.38 cr.), i.e., Rs.41.69 lacs, has been adjusted (set off) in computing the book profit u/s. 115JB. The Indian Tax Law does not recognise the concept of carry backward of losses, so that the same could only be adjusted against future profits. The law, per clause (iii) of *Explanation 1* to section 115JB, nowhere provides that it is the loss as per the balance-sheet which is to be adjusted, which could thus be that as per the profit and loss account, i.e., for the immediately preceding year, which in view of the non-carry of backward of losses, can only be, or equally be, regarded as brought forward. While the profit and loss is stipulated (per s. 115 JB(2)) to be in terms of Parts II and III of Schedule VI to the Companies Act, 1956, there is no such stipulation for the balance-sheet, whose function is to show the

source of funds and their application. *This may be done in a particular manner which may not necessarily be in the same manner as reflected in the books of account.* To be more explicit, Part I of the said Schedule VI provides that the debit balance in the profit and loss account is shown as a deduction from uncommitted reserves. That, however, is only form of presentation and does not mean that the loss (represented by the debit balance in the profit and loss account) is absorbed by past reserves in the books of account. Further, the assessee has already accepted the adjustment to its' returned book profit, i.e., in the quantum proceedings, and it's explanation on merits is only *qua* penalty proceedings, which are separate and distinct proceedings and, further, that a wrong claim for deduction would not automatically result in a liability toward penalty. What would save penalty is a plausible explanation (for the claim for deduction), coupled with disclosure of all material facts, i.e., material to the computation of income – in short, a *bona fide* conduct. The fore-going sums up the assessee's case.

3.3 All that the law obliges the assessee, i.e., to eschew penalty, is to exhibit its' *bona fides* in making the claim it has per its return. The provision, read with *Explanation* 1 thereto (which need not be separately invoked), reproduced as under, is self-explanatory, and the case law in the matter legion, and toward which we may cite some celebrated decisions, viz *Mak Data (P.) Ltd. vs. CIT* [2013] 358 ITR 593 (SC); *Union of India v. Dharmendra Textile Processors* [2008] 306 ITR 277 (SC); *K.P. Madhusudhanan vs. CIT* [2001] 251 ITR 99 (SC); *B.A. Balasubramaniam and Bros v. CIT* [1999] 236 ITR 977 (SC); *Addl. CIT vs. Jeevan Lal Shah* [1994] 205 ITR 244 (SC); *CIT vs. Nathulal Agarwala & Sons* [1985] 153 ITR 292 (Pat)(FB):

**‘Failure to furnish returns, comply with notices, concealment of income, etc.**

**271** (1) If the Assessing Officer or the Commissioner Appeals in the course of any proceedings under this Act, is satisfied that any person-

(a).....

(b).....

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or

(d).....

he may direct that such person shall pay by way of penalty,-

(i).....

(ii).....

(iii).....

Explanation 1- Where in respect of any facts material to the computation of the total income of any person under this Act,-

(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner Appeals or the Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is *bona fide* and all the facts relating to the same and material to the computation of his total income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.’

3.4 We may next examine the assessee’s explanation on the anvil or the touchstone of it’s plausibility, i.e., its tenability in law. The reference to either profit and loss account or balance-sheet is only for the purpose of ascertaining the loss, if any, brought forward as per the books of account. This is as the law speaks of one figure (of loss or unabsorbed depreciation) as per the books of account. *Could there be, one may ask, two figures (or two set of figures) for the same?* Whether, therefore, one may refer to the balance-sheet or the profit and loss account, and irrespective of the

manner of its presentation – of which much is made out, the same would reveal or reflect the same figure, i.e., *qua* a particular aspect, as for example, the loss brought forward. Why, both are supposed to reflect the position – be it of the working results (for the account period) or the state of affairs (as at the end of the account period), *only as per the books of account*, implying their being in consistence and in agreement therewith. That is, the two (the P&L A/c and the Balance Sheet), though functionally different, designed to yield different information about the reporting enterprise, are only, and only necessarily so, as per the books of account. *Reference to one (profit and loss account) in preference to the other (balance-sheet), as does the assessee, is misleading.* Could the books of account reveal different figures, whether one may look at the profit and loss account or the balance-sheet, both of which, termed final accounts, are drawn only from the books of account, and are to be read together. This would even otherwise be apparent from a mere browse of the final accounts, reproduced hereinbefore. The balance in the ‘Profit & Loss A/c’, whether one looks at the said account or the Balance-Sheet (of which it forms a part) or, further, the Director’s Report (for the year), is Rs. 25,863.14 lacs, so that the loss carried forward to the account period 2005-06, the relevant year, or brought forward from the earlier years, i.e., as on 01/4/2005, the beginning of the year, is nil.

Put differently, the balance brought forward (from the earlier years) can only be one, single balance, carried forward as at the end of the immediately preceding year, 31.3.2005 in the instant case. This is axiomatic, and there cannot conceivably be two (or more) balances, either of brought forward loss or unabsorbed deposition. All that one needs to look at is at the balance of the profit and loss account as at the end of the immediately preceding year, or, equally at the beginning of the current year, and which would reflect the profit or, as the case may be, loss carried forward to, i.e., brought forward from the immediately preceding year, the current year. It is a cumulative balance, which subsumes the credits (on account of profits) or debits (on account of losses) to the P & L account, itself a balance-sheet item. If it is a positive balance, implying a cumulative profit, there is no question of any unabsorbed

depreciation, which is thus nil in-as-much as depreciation is debited to the P & L account. If not, i.e., is a negative figure, the amount of depreciation included therein is to be segregated, so that the two, the unabsorbed depreciation and the balance loss are separately known, and the lower of the two set off. If the gross loss is lower than depreciation charged to the P&L A/c (be it for one or more years preceding the current year), it implies there is no loss, other than depreciation, so that it is nil, making the provision of clause (iii) of *Explanation 1* to s. 115-JB inapplicable. Notably, the provision does not employ the word “losses”. In fact, even if it did, it would only imply losses for all the preceding years, taken cumulatively, as reduced by the cumulative profit (for all these years). And, at any rate, may give rise to some doubt only in such a non-existent case.

The assessee adverts to there being no concept of carry backward of losses under the in Indian tax laws, which contemplate only carry forward of losses. The argument, though based on a truism, is both invalid and misconceived. To explain, let us take illustrative figures, as of loss for the immediately preceding year at Rs.20 (say), and of brought forward balance in the profit and loss account at a profit of Rs.120/-, so that the balance in the profit and loss account, as per the balance-sheet as at the end of the of such year (or at the beginning of the current year) is Rs.100/-. Going by the assessee’s argument, there would be two sets of figures of profit (or loss) brought forward, i.e., profit of Rs.120/- and a loss of Rs.20/-, for the current year as per the books of account. *Could it possibly be?* Surely not, in-as-much as both profit and loss cannot co-exist, so that the profit or loss brought forward is only the net profit of Rs.100/-. The accounts bear only one account for the profit or loss, i.e., the ‘Profit & Loss A/c’, the balance wherein, at any given point of time, reflects the profit or, as the case may be, loss, that is brought forward from one year to the next - the account being prepared annually. A loss (for a particular year) would only go to add to the amount of loss, if any, being carried forward in books or reduce the profit being, likewise, carry forward. When the loss is so adjusted, there is no carry backward of loss, so to speak, but the same only enters the or contributes to the

general pool of profit or, as the case may be, loss, yielding a figure of cumulative profit/loss as per the books of account, which is carry forward to the following period and, likewise, from year to year. Nothing more and nothing less. Further, when the loss is adjusted (set off) against the profit for a year for the purpose of determining the book profit on which the minimum alternate tax (MAT) is liable, it is only a case of brought forward of loss, i.e., by way of adjustment on being brought forward, and not carry backward.

There is, further, nothing in the language of the provision of clause (iii) of *Explanation 1* to section 115 JB that suggests or gives room to any ambiguity, much less of the sort being canvassed by the assessee. The profit or loss brought forward (to any year) is, as afore-stated, a balance-sheet – which statement is a tabulation of the account balances in a manner so as to depict the (financial) state of affairs of the reporting enterprise as at the value date, generally the end of the account period, item. It thus reveals the sources of funds with it, and their application. There is no reference therein to any particular year or period to which a particular item pertains. An asset may be purchased a month or (say) years prior to the value date. It shall, however, stand to be classified under the appropriate head of assets. Likewise, for a liability incurred. Similarly, there is nothing in the language of the provision to indicate any reference to the year to which a particular loss brought forward pertains to, and the unequivocal expression of intent is to allow adjustment for the loss, if any, brought forward (from the earlier periods) as per the books of account. Once a profit or loss for a particular year merges in the profit and loss account, it loses its separate identity and, in any case, has no bearing, either on the relevant provision of law (section 115JB) or its rationale. As depreciation is a mandatory charge to the profit and loss account (for a period), it is further clarified (per the provision itself) that the loss to be taken is exclusive of depreciation. The lower of the two, reckoned on an absolute basis, is to be allowed set off/adjusted. It may be recalled that the language of the erstwhile section 115J allowed scope for a controversy as to how the loss/es is to be reckoned, i.e., whether inclusive or exclusive of depreciation, and which stands

considered by the Apex Court in *Surana Steels (P.) Ltd. v. Dy. CIT* [1999] 237 ITR 777 (SC).

There is reference to the decision in the case of *Peico Electronics & Electricals Ltd. vs. CIT* [2011] 339 ITR 506 (Cal) in the assessee's written submissions (to the ld. CIT(A)). Though, in fairness, the said decision was not referred to by the ld. AR while pleading assessee's case, in-as-much as there is no reference to the said decision in the impugned order, we consider ourselves obliged to consider the same. The same stands carefully perused. The same is on a different aspect of the matter, from which therefore no support can be drawn. The issue in that case was whether it is the loss, gross of unabsorbed depreciation (Rs. 1648.74 lacs) or net of it (Rs. 261.04 lacs), that is required to be adjusted/set off for the purpose of deduction u/c (iv) of s. 115 J(1A) (corresponding to clause (iii) of *Explanation 1* to s. 115 JB), i.e., for the purpose of computing the book-profit u/s. 115-J (the extant provision). The Hon'ble Court decided in favour of net loss, being lower than the unabsorbed depreciation of Rs. 1385.66 lacs, also referring to the decision in *Surana Steels (P.) Ltd.* (supra).

Surely, a possible view will exclude penalty. However, a view to qualify as a possible one has to be reasonable, and have its' basis in the language of the provision, if not in its rationale as well. Speaking in the context of addition for an unexplained credit u/s. 68, the apex court in *CIT vs. P. Mohanakala* [2007] 291 ITR 278 (SC) clarified that the expression 'the assessee offers no explanation' therein (which corresponds to the language of clause (A) of *Explanation 1*(A) to section 271(1)(c), which speaks of the assessee failing to furnish any explanation) means that where the assessee offers no proper, reasonable or acceptable explanation as regards the sums found credited in the books of account maintained by the assessee. True, the same is in the context of section 68, but the same, as afore-stated, again only obliges the assessee to furnish an acceptable explanation - as does *Explanation 1* to section 271(1)(c), to eschew the sum credited in his books of account being brought to tax. The same would accordingly clearly apply to a case of penalty as well. Again, speaking in the context of a similar argument canvassed in *CIT vs. Mirza Atullaha*

*Baig* [1993] 202 ITR 291 (Bom), the Hon'ble Court, while admitting the proposition that in case of any doubt with regard to interpretation, the benefit of doubt should be given to the assessee, i.e., in principle, clarified that the said proposition cannot be stretched too far, and would not apply where the statutory provision is otherwise clear and brooks no doubt; it explaining its stand as under:

*'The next submission on behalf of the assessee was based on the oft repeated well-known principle of interpretation of fiscal statutes that in the event of any doubt in regard to interpretation, the benefit of doubt should be given to the assessee and the interpretation beneficial to the taxpayer should be accepted. We do not find any merit in this submission because this principle applies only when there is reasonable and genuine doubt in regard to the interpretation of a particular provision. It has no application to a case where the provision is clear and the law is well-settled. This principle cannot be stretched too far. It cannot be used to misinterpret a statutory provision which is otherwise clear and brooks no doubt about its meaning or interpretation just to give benefit to the taxpayer which the statute did not intend to give.'*

We may finally advert to the decision in the case of *CIT vs. NG Technologies Ltd.* (in ITA No. 82/2012 dated 01.12.2014), SLP against which stands since dismissed by the Hon'ble Apex Court. The said decision is rendered in the context of penalty u/s. 271(1)(c) to the effect that any claim with regard to a legal stand cannot be admitted where it is *prima facie* incorrect or wrong. The claim should not be banal or a ruse and the penalty cannot be deleted under the guise or pretence of a legal opinion used as a smokescreen or façade. Allowing this will be stretching and making the requirement to prove a *bona fide* conduct illusory and ineffective and would fail to check and stop fanciful and incredible claims. It is noticeable, it continued, that most of the income tax returns are accepted without scrutiny or regular assessment and self-compliance of tax provisions is a rule required to be followed (reference in this regard is made to paras 16, 17 and 18 of the decision). In the present case, we have already shown that no ambiguity exists and the clear language of the provision does not, at any rate, admit of the interpretation sought to be provided to it by the assessee.

Before parting with our order, it would be relevant to state that Ground # 4 was not argued or pressed before us, and neither do we find any relevance thereof to the subject issue in-as-much as the claim for depreciation (or on a particular asset/block of assets) is not in issue, but concerns the interpretation of the provision of clause (iii) of *Explanation 1* to s. 115 JB of the Act.

4. In view of the foregoing, we find no merit in the assessee's claim. The same is accordingly liable to be, and is accordingly rejected, upholding the Revenue's stand. We decide accordingly.

5. In the result, the assessee's appeal is dismissed.

परिणामतः निर्धारिती की अपील खारिज की जाती है ।

*Order pronounced in the open court on June 30, 2016*

Sd/-  
(Pawan Singh)

न्यायिक सदस्य / Judicial Member

Sd/-  
(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 30.06.2016

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**