

आयकरअपीलीयअधिकरण, 'बी' न्यायपीठ,चेन्नई  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
"B" BENCH, CHENNAI**

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवंश्री एस जयरामन, लेखा सदस्य केसमक्ष

**BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND  
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A. No. 1279/Mds/2014**

**निर्धारण वर्ष/Assessment Year : 2003-04**

M/s. FLSmidth Minerals P Ltd.,  
(Since merged with FLSmidthPvt. Ltd.)  
FLSmidth House,  
34, Egatoor, Kelambakkam,  
Old Mahabalipuram Road,  
Chennai – 600 103.

Deputy Commissioner of Income Tax,  
Vs. Company Circle –II(1),  
Chennai – 34.

**[PAN: AAACF 1122D]**

**(अपीलार्थी/Appellant)**

**(प्रत्यर्थी/Respondent)**

अपीलार्थीकीओरसे/Appellant by

: ShriG. Baskar, Advocate

प्रत्यर्थीकीओरसे/Respondent by

: Ms. Ann Mary Baby, JCIT

सुनवाईकीतारीख/Date of Hearing

: 22.05.2017

घोषणाकीतारीख/Date of Pronouncement

: 18 .08.2017

**आदेश / O R D E R**

**PER S. JAYARAMAN, ACCOUNTANT MEMBER:**

The assessee filed this appeal against the order of the Commissioner of Income Tax (Appeals)-II, Chennai in ITA No. 411/2013-14 dated 16.01.2014.

2. FLSmith Private Limited (Formerly FLS Automation India Private Limited) is a company, engaged in the business of design and supply of automation systems to cement and other industries. In the assessment made for the assessment year 2003-04 on 10.03.2006, the Assessing Officer made various additions and disallowances and initiated penalty proceedings u/s. 271(1)(c). Assessee appealed against that assessment order, the CIT(A) confirmed the additions/disallowance of (i) depreciation claimed on let out properties at Rs. 4,32,251/- and (ii) reversal of warranty provision of earlier years of Rs. 87,84,696/-. Consequent to the order of the CIT (A), the Assessing Officer initiated penalty proceedings, gave opportunity of being heard, after considering all the objections and the details submitted by the assessee, levied penalty at Rs. 33,87,230/- being 100% of the tax sought to be evaded. Aggrieved, the assessee filed an appeal before the CIT(A). The CIT(A) dismissed the appeal.

3. Aggrieved, the assessee filed this appeal, inter alia, with the following grounds:

*a. The Commissioner of Income Tax (Appeals) erred in rejecting the appeal of the Appellant herein, vide order dated 16.01.2014, confirming the penalty u/s. 271(1)(c) of the Act levied vide order dated 30.03.2010.*

*b. The Commissioner of Income Tax (Appeals) erred in confirming the levy of penalty with respect to the claim of depreciation on leased factory building in the absence of concealment or furnishing of*

*inaccurate particulars in this regard. The provisions of Sec. 271(1)(c) are not attracted in the present case.*

*c. The lower authorities ought to have noted that it is entitled to depreciation in respect of the factory building irrespective of whether the income therefrom offered to tax under the head 'business' or 'other sources'. The claim is thus in order.*

*d. In any event, the eligibility to depreciation is a legal issue and any difference in interpretation thereof does not result in concealment or furnishing of accurate particulars. The fact that the Appellant did not challenge the rejection aim of depreciation does not impact the levy of penalty which is to be levied on the basis of the applicable provisions.*

*e. The Commissioner of Income Tax (Appeals) erred in confirming the levy of penalty on the basis of non-reversal of provisions for warranty relating to assessment years 1999-2000 and 2000-01. The authorities have noted the position that the appeals in this regard were still pending before the Income Tax Appellate Tribunal. Thus, there was no finality with regard to the issue till the order of the Jurisdictional High Court in T.C.(A) No.263 of 2007 dated 9.6.2009 and 7.12.2009. Upon pronouncement thereof, the provisions stand reversed in full. The levy of penalty in such circumstances is wholly unjustified.*

*f. The order of the Commissioner of Income-tax (Appeals) confirming the levy of penalty proceeds on assumptions and presumptions. This is wholly contrary to law. The levy of tax and penalty is to be completed de novo in respect of every assessment year and observations in regard to other periods cannot form the basis of levy of penalty for other periods. This is all the more so in the case of levy of penalty."*

4. The facts on the first issue is that the assessee owned a factory building at Arakkonam which was not used for its business from the

assessment year 1999-2000 onwards. It let out this unused factory buildings to one of its group concerns, received rental income during the financial year 2002-03 and admitted the income under the head income from 'house property' in its return filed for the a y 2003-04. However, the assessee claimed a depreciation of Rs.4,32,251/- on those factory buildings also, as if it was used for the assessee's business. The Assessing Officer in the assessment order held that since the rental income is offered to tax under the head income from 'house property' , the assessee is not eligible to claim depreciation on such let out buildings and disallowed the assessee's claim of depreciation. The CIT(A) confirmed the disallowance, on which the AO levied the penalty and the CIT(A) confirmed the levy. The AR pleaded this issue on the lines of ground nos (b) to (d) of the appeal grounds extracted above.

4.1 Per contra, the DR relied on the C'sIT(A) finding that the assessee's claim that it had an option to offer the rental income to tax under the head 'income from other sources' where it can claim depreciation u/s. 57(ii) of the Act, is not correct. Though it is a factory building, what was let-out was only the building. There are no plant and machinery included in the said let-out. Thus ,the rental income is not a composite rent, in order to offer it under the head 'income for other sources'. The assessee's rental income from factory building is, therefore, indisputably assessable under the head income from 'house property' only. In fact the assessee, who has sufficient professional

advise, itself offered the rental income under the head income from 'house property'. Therefore, assessee's explanation is devoid of any merits. Further, if the assessee wants to offer the rental income under the head 'income from other sources' and claim depreciation u/s.57(ii) , it will not be entitled for standard deduction of 30% of the rentals u/s.24(a) . In other words, if the assessee wants to claim depreciation u/s.57(ii) by offering the rental income to tax under the head 'income from other sources', it has to lose the benefit of deduction of 30% of the rentals u/s. 24(a). But the intentions of the assessee are otherwise. On one hand, by offering the rental income under the head income from 'house property', it has claimed deduction of 30% of the rentals u/s.24(a). At the same time, it has also claimed depreciation on the same let-out buildings under section 32 . This is a clear double deduction, which is not permitted in the Act. Further, the fact of claiming depreciation on the let-out buildings has come to the notice of the Assessing Officer only during the course of assessment proceedings. Thus, there is a clear concealment of taxable income, by furnishing inaccurate particulars, on account of claiming depreciation of Rs.4,32,251/- on the let-out buildings. Therefore ,the Assessing Officer has rightly concluded that the claim of depreciation on let-out buildings is a concealment of income by furnishing inaccurate particulars, for levying penalty u/s. 271 (1)(c) .

5. We heard the rival submissions and gone through relevant orders and material. From the above, it is clear that the assessee, on one hand, by admitting the rental income under the head income from 'house property', has claimed deduction of 30% of the rentals u/s.24(a) . At the same time, it has also claimed depreciation on the same let-out buildings under section 32. Thus, there is a double deduction claim, which is not permitted in the Act. Further, the fact of claiming depreciation on the let-out buildings has come to the notice of the Assessing Officer only during the course of assessment proceedings. Thus, there is a clear concealment of taxable income, by furnishing inaccurate particulars, on account of claiming depreciation of Rs.4,32,251/- on the let-out buildings. Therefore, the assessee's explanation is found to be false within the scope of Explanation 1 rws 271(1)(c). On such facts and circumstances, the Assessing Officer and the CIT(A) have rightly concluded that the claim of depreciation on let-out buildings is a concealment of income by furnishing inaccurate particulars and hence the levy penalty u/s. 271 (1)(c) on this issue is confirmed.

6. The next issue is that the assessee is a contractor for certain projects. In some of these projects, as per the terms and conditions, the assessee is liable for certain warranties. In its accounts (P&L account), the assessee is showing the entire income on the credit side and debiting the warranty liabilities "by way of provisions for warranties". When the warranty period is

expired and where there are no warranty claims from the contractees, the assessee is recognizing the said amount as income by crediting the same by way of "warranty provisions no longer required - written back". The returns were also being filed on the same lines. This is the consistent method of accounting followed by the assessee. In the scrutiny assessments made for ays 1997 -98 to 2002-03, the Assessing Officer disallowed assessee's claims of 'provisions for warranties' debited in P&L account holding that they are unascertained liabilities. The CIT (A) confirmed the Assessing Officer's action. For the current a y 2003-04 also , the books of accounts were maintained in the same manner . However, in the 'computation of taxable income statement' , the assessee reduced the amounts of "warranty provisions no longer required - written back", on the ground that the corresponding provisions for warranties in the ays. 1997-98 to 2000-01 were disallowed by the Assessing Officer. Subsequently, the ITAT had allowed the assessee's appeals on 'provision for warranty claims' as a deduction. Hence, the Assessing Officer while doing the assessment for ay 2003-04 considered the 'warranty provision written back' at Rs.87,74,691/- pertaining to ays.1999-00 and 2000-01, which was claimed as deduction in the computation of income, as the income and added to the taxable income. The CIT (A) confirmed the disallowance, on which the AO levied the penalty and the CIT (A) confirmed the levy.

6.1 In this regard, the AR pleaded that the assessee's claim is that the amount added as income represents the 'provisions for warranties' created in a ys.1999-00 and 2000-01, against such additions it filed appeals before the ITAT which was pending at the time of filing the revised return and submitted the chronological events as under :

- 12.12.2002 ITAT dismissed appeals of AYs 1997-98 & 1998-99 thus confirming the disallowance of provision for warranty
- 24.11.2003 ROI of A.Y. 2003-04 was filed on 24.11.2003, wherein the reversal of the warranty provisions of AYs. 1997-98 to 2000-01 was reduced in computation statement. In that the provision for warranties created & debited in P&L a/c of this year was not claimed as deduction
- 21.07.2014 ITAT allowed the Miscellaneous Petition of assessee and deleted the addition of 'provisions for warranties' in A.Ys 1997-98 & 1998-99
- 18.10.2004 AO issued first notice u/s.143(2) for A.Y.2003-04
- 31.03.2005 Assessee filed revised ROI for A.Y.2003-04 offering the reversal of the warranty provisions of AYs 1997-98 & 1998-99 to tax. At the same time the provisions for warranties created in F.Y.2002-03 were also claimed as deduction in this revised ROI
- 10.03.2006 Assessment u/s.143(3) was made by bringing the reversal of the warranty provisions of RS.87,84,696 of AYs 1999-00 & 2000-01 to tax.
- 29.03.2007 ITAT allowed the Assessee's appeals and deleted the addition of 'provisions for warranties' made by the AO in AYs 1999-00 & 2000-01

31.03.2008 CIT(A) confirmed the additions made by the AO for this year

16.05.2017 Revenue's appeals before the High Court for AYs.1997-98, 1998-99, 1999-2000 & 2000-01 filed and are pending even today

and argued that as on the date of filing the original return of ay.2003-04 on 24.11.2003, the assessee lost its appeals up to ITAT level. Therefore, the assessee had a reason in not offering the reversal of the provisions of earlier years, though the same was recognized as revenue and credited to the P&L account of F.Y.2002-03. Similarly, the assessee has not claimed the current year's warranty provisions, as deduction, even though they are debited in the P&L account of F.Y. 2002-03. However, the assessee company had filed miscellaneous application against the orders of ITAT in ays.1997-98 and 1998-99. The ITAT while passing the orders on miscellaneous applications for ays.1997-98 and 1998-99, on 21.07.2004, held that the warranty provisions debited in the P&L accounts are allowable deductions. Therefore, as on 21.07.2004, the issue of allowability of "provisions for warranties", has been held in favour of the assessee by the ITAT. On receipt of the orders of ITAT of ays.1997-98 and 1998-99, the assessee filed a revised return of income for a y .2003-04, in which the assessee -

- (i) Considered and offered the reversal of warranty provisions of a ys.1997- 98 and 1998-99 as the income of the year (A.Y.2003-04); and

(ii) Considered and claimed the current year's provisions for warranty as expenditure (deduction) of the year.

While considering and offering the reversal of warranty provisions of the earlier years as the income of F.Y.2003-04, the assessee company has taken the provisions claimed in the ays.1997-98 and 1998-99 only. The reversal of warranty provisions of Rs 87,74,696/-, pertaining to the ays.1999-2000 and 2001-02, were not considered by the assessee as income in the revised return as the corresponding appeals were still pending before the ITAT as on the date of filing the revised return. The AR further argued on the lines of ground nos (e) & (f) of the appeal grounds extracted above .

6.2 Per contra, the DR submitted relying on the order of the CIT(A) stating that firstly, though the appeals of ays.1999- 2000 and 2000-01 are still pending before the ITAT, the issue has been decided in favour of the assessee in the immediate two preceding ays.1997-97 and 1998-98. Since the facts are common and the issue is recurring and in continuation the said decision, by all probability, would have been followed in following ays.1999-2000 and 2000-01 also. Hence the assessee was well aware that it is, by all probability, is going to win the appeals of the following two ays. 1999-2000 and 2000-01 also. Secondly, the assessee has been following the system of claiming the 'provisions for warranty' as expenditure by debiting to the P&L account; and reversal of the 'warranty provisions no longer required' as

income by crediting in the P&L account. This is a consistent practice by the assessee including the current year. Therefore, when the assessee itself had recognized the (reversal of warranty provisions of ays. 1997-98 to 2000-01 as the income of the FY.2002-03 in its books of accounts by crediting the same in the P&L account, it should have included the same in its taxable income, especially when the ITAT held the issue of allowability of 'provisions for warranty' in favour of the assessee. In such a situation, the assessee's act of offering the 'reversal of the warranty provisions' of only ays.1997 -97 and 1998-99 and not those of a. ys. 1999-00 and 2000-01, is a smart and deliberate attempt to defraud the revenue. When the issue is decided by the ITAT in the first two years and likely to be followed in the following years (where the appeals are pending), the assessee should consider the same for all the years, especially when the decision is in line with the method of accounting and recognising the income in its books of accounts. Any failure in this regard, will amount to concealment of income or furnishing of inaccurate particulars.

7. We heard the rival submissions and gone through relevant orders and material. From the above, it is clear that the assessee has admitted the income for the period for which the ITAT has decided the appeals ie for ays 1997 & 1998 in its revised return. It's explanation that its appeals for ays, 1999-00 and 2000-01 was pending before the ITAT as on the date of filing

the revised return for ay 2003-04 and hence it did not admit the income related to those ays is a fact, as per the chronological events extracted, supra. Neither the AO nor the CIT (A) found that this explanation of the assessee to be false. Hence, on this issue, there is no ground to levying penalty u/s 271(1) (c) read with Explanation1. In view of that the penalty levied on this issue is directed to be deleted. All the grounds of appeal on this issue is allowed.

8. In the result, the assessee's appeal is allowed partly.

Order pronounced on 18<sup>th</sup> August, 2017 at Chennai.

**Sd/-**  
**(एन.आर.एस .गणेशन)**  
**(N.R.S. GANESAN)**  
**न्यायिकसदस्य/Judicial Member**

**Sd/-**  
**(एसजयरामन)**  
**(S. JAYARAMAN)**  
**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,

दिनांक/Dated: 18<sup>th</sup> August, 2017

**JPV**

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF