

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 3396/MUM/2016
Assessment Year: 2009-10**

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| M/s Cana Glass Ltd., PREDPL, 52, Natasha House, Hill Road, Mumbai - 400050 PAN: AAACC5587D | Vs. | The Dy. Commissioner of Income Tax, Circle 9 (1), Aaykar Bhavan, Mumbai - 400020 |
| (Appellant) | | (Respondent) |

Assessee by : Shri Hari Raheja (AR)
Revenue by : Shri Ram Tiwari (Sr. DR)

Date of Hearing: 02/01/2018
Date of Pronouncement: 28/02/2018

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against the order dated 09.02.2016 passed by the Commissioner of Income Tax (Appeals)-20, Mumbai, for the assessment year 2009-10, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against penalty order passed by the AO u/s 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act').

2. Aggrieved by the order of Ld. CIT (Appeals), the assessee has preferred this appeal before the Tribunal on the following effective grounds:-

1. *"On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) was not justified in confirming the levy of penalty of under section 271 (1)(c) of the Income Tax Act 1961 for in respect of the*

wrong claim of depreciation and holding the same to be furnishing inaccurate particulars of income.

2. The appellant submits that the appellant has not furnished inaccurate particulars of income, and as such the levy of penalty us/ 271(1)(c) is unwarranted on the facts on the circumstances of the case.”

2. Brief facts of the case are that the assessee filed its return of income for the assessment year 2009-10 declaring Nil income after set off the losses to the extent of Rs. 1,57,27,454/-. Assessment order was passed u/s 143(3) of the Act determining the total income of the assessee at Rs. 1,72,04,350/-after making disallowance of Rs. 40,48,505/-claimed as depreciation and disallowance of Rs. 4,36,811/-expenses claimed by the assessee.

3. Accordingly, penalty proceedings were initiated and the AO imposed penalty of Rs. 13,85,963/-u/s 271(1)(c) of the Act. In the first appeal, the Ld. CIT(A) after hearing the assessee deleted the addition of Rs 4,36,811/-holding that since the admissibility of claim is debatable, penalty cannot be levied on this claim. However, the Ld CIT(A) sustained the penalty levied on claim of depreciation made by the assessee.

4. Before us, the Ld. counsel for the assessee submitted that the issue involved in the present case is covered in favour of the assessee by the decision of the Mumbai Tribunal rendered in assessee's own case ITA No 3395/Mum/2016 for the assessment year 2007-08. The Ld. counsel further submitted that the AO had disallowed the similar claims of assessee and penalty was levied on the addition. In the first appeal the CIT(A) deleted the penalty in relation to disallowance of expenses and sustained the penalty of claim of depreciation. But the Tribunal deleted the same. Hence, in the present case the penalty confirmed by the Ld. CIT(A) is liable to be deleted.

5. On the other hand, the Ld. departmental representative relied on the findings of the Ld CIT(A).

6. We have carefully perused the material on record in the light of the contentions of the parties. The Ld. CIT(A) has confirmed the penalty on disallowance of claim of depreciation holding that since the assets were not used and there were no business activities during the previous year the assessee is not entitled for the said claim, therefore the assessee is liable to be penalized u/s 271(1)(c) of the Act for claiming wrong and inadmissible claim. We further notice that the coordinate Bench of the Tribunal has deleted the penalty levied in the similar set of facts and circumstances of the case in assessee's own case for the assessment year 2007-08 aforesaid. The operative part of the said order reads as under:-

“6. We have considered the rival submissions. The learned representative for the assessee has explained the circumstances in which the return of income was filed by the assessee, including the facts that proper professional advice was not available. It has also been explained that the business of the assessee was lying discontinued on account of labour trouble and it was facing financial hardships also. It is also emerging from the record that assessee had significant past losses. Considering the entirety of circumstances, in our view, a mere mistake in making of claim in the return of income would not ipso facto lead to the conclusion of concealment of income or furnishing of inaccurate particulars of income for the purpose of Sec.271(1)(c) of the Act. Quite clearly, in the present case the wrong claim of depreciation made by the assessee cannot be construed to have been made with an intention to evade taxes inasmuch as even before the allowance of depreciation, the resultant income of the assessee is a loss and it had significant past losses, which have also remained unabsorbed. It has been pointed out by the assessee that such losses have lapsed on account of not being set off against income within the stipulated period. Considering the entirety of circumstances, in our view, the disallowance of depreciation in the instant year is a mistake and does not invite the provisions of Sec.

271(1)(c) of the Act. Notably, the Assessing Officer had also disallowed certain expenses debited in the Profit and Loss Account for the reason that the business of the assessee was discontinued, and on such disallowance also the Assessing Officer had levied penalty. The penalty in relation to disallowance of expenses has been deleted by the CIT(A). Clearly, the basis for disallowance of depreciation as well as expenses was similar, i.e. non-carrying out of any business activity in the instant year. Thus, if the basis of disallowance of the two claims was similar, and if one has been found not exigible to penalty u/s 271(1)(c) of the Act by the CIT(A), we find no justifiable reason for the CIT(A) not to delete the penalty with respect to the other claim. Therefore, for all aforesaid reasons, we deem it fit and proper to direct the Assessing Officer to delete the penalty imposed in relation to the denial of claim of depreciation also.”

7. Since, the coordinate Bench has deleted the penalty confirmed by the CIT(A) in a similar set of facts and circumstances in assessee's own case for the assessment year 2008-09, we do not find any reason to deviate from the view taken by the coordinate Bench. Hence respectfully following the decision of the coordinate Bench we set aside the findings of the Ld. CIT(A) and direct the AO to delete the penalty imposed in relation to the denial of claim of depreciation in this case.

In the result, appeal filed by the assessee for assessment year 2009-2010 is allowed

Order pronounced in the open court on 28th February, 2018.

Sd/-
(SHAMIM YAHYA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 28/02/2018

Sd/-
(RAM LAL NEGI)

JUDICIAL MEMBER

आदेश 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
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 (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**