आयकर अपीलीय अधिकरण, मुंबई "एल" खंडपीठ

Income-tax Appellate Tribunal -"L"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं अमित शुक्ल न्यायिक सदस्य

Before S/Sh.Rajendra,Accountant Member and Amit Shukla,Judicial Member

आयकर अपील सं./I.T.A./3139/Mum/2008,**निर्धारण वर्ष /**Assessment Year: 2000-01

आयकर अपील सं./I.T.A./3140/Mum/2008,**निर्धारण वर्ष /**Assessment Year: 2001-02

आयकर अपील सं./I.T.A./3141/Mum/2008,**निर्धारण वर्ष /**Assessment Year: 2002-03

State Bank of Mauritius Ltd. 101, Raheja Centre, Free Press Journal Road,Nariman Point Mumbai-400 021. **PAN:AABCS 4465 K**	Vs.	DDIT –(Intl. Taxation), Range-2(1) Scindia House, Ballard Pier, Mumbai-400 038.

आयकर अपील सं./I.T.A./1194/Mum/2010,**निर्धारण वर्ष /**Assessment Year: 2004-05

State Bank of Mauritius Ltd. Mumbai-400 021. **PAN:AABCS 4465 K**	Vs.	ADIT –(Intl. Taxation), Range-2(1) Scindia House, Ballard Pier, Mumbai-400 038.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी / Respondent)

Revenue by: Shri T.R. Paite-Sr.AR

Assessee by: Shri Niraj Sheth

सुनवाई की तारीख **/ Date of Hearing: 20.09.2016**

घोषणा की तारीख **/ Date of Pronouncement: 30.09.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार/ Per Rajendra, A.M.-

Challenging the orders,dt.29.02.2008 and 31.12.2009 of the CIT(A)-XXXI, Mumbai and CIT(A)-II,Mumbai respectively the Assessee has filed appeals for the above mentioned four years.The assessee is engaged in the business of banking.As the issues involved in all the appeals are common and involve identical issues,so we are disposing them off by a consolidated order.The details of assessment orders, penalty imposed etc. can be summarised as under :-

AY.	143(3)order,dt.	Dt. of Penalty order	Penalty Imposed	CIT(A) order dt.
2000-01	28.03.2003	22.03.2007	Rs.6,46,976/-	29.02.2008
2001-02	12.03.2004	22.03.2007	Rs.3,01,073/-	29.02.2008
2002-03	07.03.2005	22.03.2007	Rs.15,69,520/-	29.02.2008
2004-05	nil	20.03.2009	Rs.3,51,943/-	31.12.2009

ITA./3139/Mum/2008,AY.2000-01:

Assessee-company,filed its return of income on 02.12.1996, showing income of Rs.3.15 crores.Subsequently, the Assessing Officer (A.O.) completed the assessment u/s. 143(3) r.w.s. 147 of the Act on 19.3.2007, determining the income of the assessee at Rs.5.27 crores.

2.During the course of assessment proceedings, the AO found that the assessee had claimed expenditure of Rs.2.31 crores on acquisition of fixed assets.The AO held that expenditure incurred by the assessee was capital in nature though it had claimed it as revenue expenditure. He further found that the assessee had not only claimed capital expenditure, but it had also claimed depreciation on the assets.He held that the assessee had claimed double deduction on the same expenditure to the extent of the depreciation claimed. He directed the assessee to show cause as to why a capital expenditure incurred on fixed assets should not be treated as capital expenditure. After considering the submission of the assessee,the AO held that the domestic law would apply in the case of the assessee , that the claim made by it was on account of capital expenditure,for which deduction was not admissible. The AO also initiated penalty proceedings as per the provisions of section 271(1)(c) of the Act.In reply to penalty notice,the assessee filed its letter,dated 10.03.2007 and argued that it had not concealed its income nor did it furnish inaccurate particulars, that in terms of Article-7(3)of the Indo Mauritius DTAA Treaty it had claimed capital expenditure as a deductible item,that the expenditure was incurred wholly and exclusively for the purpose of business.

2.1. After considering the submission of the assessee,the AO held that the assessee,in addition to claiming 100% deduction on the capital expenditure,claimed depreciation on fixed assets, that it amounted to double deduction to the extent of depreciation claimed, that by making claim for deduction of capital expenditure, to which it was not eligible for, the assessee had furnished inaccurate particulars of its income, that it was the duty of the assessee to show the correct total income and pay taxes accordingly, that the claim of the assessee that disallow - ance was made only due to difference of opinion was an incorrect statement, that the assessee had claimed the expenditure incurred for acquiring fixed assets, that it had also claimed depreciation,that the assessee had furnished inaccurate particulars of income by claiming deduction for capital expenditure, that it was a fit case where penalty u/s. 271(1)(c) should be levied.Accordingly, he levied penalty of Rs.1.27 crores.

3.Aggrieved by the order of the AO,the assessee preferred an appeal before the First Appellate Authority(FAA).Before him,it was argued that the assessee had claimed expenditure on fixed assets of Rs.2.31 crores at the time of filing of its return,that it had given a complete disclosure in respect of its contention in the statement showing the computation of total income filed along with the return. It referred to Note No.1 and 2 that reads as under :-

> *"1.The assessee Bank is a corporate entity formed, registered and controlled from Mauritius. India and Mauritius have entered into a treaty for the avoidance of double-taxation and other related matters. In terms of the general principles the specific terms of the Double Taxation*

Avoidance Agreement (DTAA) override the provisions of the feneral law in the Income tax Act, 1961. A principle which has been accepted and reiterated by the central Board of Direct Taxes in its Circular No.333 dated April 2, 1982.

2. The assessee's claims and contentions Vis-à-vis the various expenses heads as under:-

(a) In view of the specific language of Article 7(3) of the Indo Mauritian Double Taxation Avoidance Agreement the assessee contends that all expenses (both revenue and capital) incurred for the purpose of the business of its branches in Bombay (permanent establishment in India) is deductible in computing its total income for the purpose of tax under the Income tax Act, 1961."

It was argued that India & Mauritius had an Agreement of Avoidance of Double Taxation, that in terms of Article 7(3) of DTAA the business of a Permanent Establishment (PE) of a Mauritian Enterprise,operating in India,had to be computed by deducting all expenses incurred for the purpose of the business whether such expenses were incurred in India or elsewhere, that though the term business profit was not defined in the DTAA, that Article-7(3) specifically provides for computation of business income in a particular manner, that the Treaty provisions would override the provisions of general law i.e. the Act. The assessee referred to Circular No.333 dated 02.04.1982 issued by CBDT. It referred to certain case laws, further it was stated that expenditure in question was incurred wholly and exclusively for the purpose of earning business profit of the PE,that full facts were given in the return of income.The assessee further contended that the AO had neither been able to prove that it had furnished inaccurate particulars nor had been able to give any specific finding in that regard, that the assessment proceedings were separate from the penalty proceedings, that penalty could be levied if the assessee acted with a malafide intention.

3.1. After considering the assessment order,penalty order and submissions of the assessee, the FAA held that one of the issues to be decided was as to whether a disclosure made in the return of an expense being deductible against business profit suffice to save a tax payer from levy of penalty. He referred to the case of Vidyagauri Natwarlala (238ITR91) of the Hon'ble Gujarat High Court and to the Explanation (1) to section 271 (1)(c) of the Act.Referring to the cases of T.J. Mathai(269ITR492),K.P.Madhusudan(251ITR91), Navbharat Traders (248 ITR 255),he held that penalty was leviable in cases where the assessee would not offer any explanation or would fail to substantiate it. He observed that the AO had analysed all the facts and had reached to a conclusion that the assessee was incorrect in claiming capital expenditure as an allowable revenue expenditure, that the conclusion of the AO was based on analysis of accounting and commercial principles and were supported by provisions of treaty and commentary on International Taxation, that the assessee had not offered any convincing explanation as to why and on what bsis it believed that capital expenditure could be claimed as deduction from business profits. The FAA referred to note No.2 given by the

assessee and held that the assessee had over looked the provisions of Article 3(2) of the OECD and UN Model Convention. As per the FAA the business profit had to be ascertained in accordance to section 28 of the Act,as envisaged by Article 3(2) of the Treaty, that the profits of the PE were required to be computed in accordance to Chapter IV of the Act, that the provisions of section 37 did not allow capital expenditure for computing profit and gains of business and profession.He also held that assessee had not interpreted the mandate of Article 7(3) of the DTAA correctly,that the said Article did not hold that even capital expenditure was allowable,that the assessee was not able to explain as to how it arrived at the conclusion that the word 'expenses' included capital expenditure also.He also referred to Article 23 of Indo-Mauritius DTAA and held that provisions of the Act relating to computation of taxable income would definitely apply in the case of the assessee except where the provisions contained in the DTAA were contrary to the conditions specifically mentioned in the Act, that the assessee could not have any advantage by citing the provisions of Article-3 of the DTAA, that there was no specific contrary provision in the treaty, that restriction on deductibility of expenses under the Act would be applicable in computation of profits attributable to Indian PE.s of Mauritius Tax Residence.He referred to the cases of Mitsubishi Heavy Industries Ltd (61TTJ656), Mashreq bank Psc (14SOT1), Cir.No.5 of 28/ 09/04 of the CBDT, Intl Tax Handbook of Internal Rev of the United Kingdom and book of K.Vogel on Double Taxation Conventions and held that the limitation under domestic law were taken into account for computation of profits of a PE under Article 7(3) of the India Mauritius Tax Treaty.Referring to provisions of section 37 of the Act, he held that capital expenditure could not be claimed as deduction while computing the income chargeable under profits and gains of business,that it was not clear as to how the assessee could derive the inference that capital expenses were allowable while computing the income under the head business profit, that there was over valuing national and international judicial precedence to the contrary, that the assessee had not adduced any evidence to support in its favour either by way of any judicial precedent or by production of any legal mandate.

The FAA also took notice of the argument of the assessee that there was difference of opinion between the AO and the assessee about the interpretation of Article 7(3) of the DTAA,that the assessee had claimed the deduction under a bona fide understanding and belief that same was permissible as per the provisions of the DTAA.He held that the assessee had to prove that debatable issue existed, it was not clear as to how it had formed an opinion that the issue is debatable,that the judicial precedence, opinion of the experts and the legal position envisaged by the Act and the treaty established that there was no debate on the issue, that all

the authorities had unanimously held that expenses were to be allowed as per the provisions of domestic law, that the assessee had not quoted any contrary jurisprudence on the issue or had brought to his notice any authority in that regard, that it had suo moto decided that it was entitled to deduct capital expenses from business profits, that it was not a case where assessee had acted in conformity with the decision of a High Court/Apex Court in its favour on the issue of deductibility of capital expenses, that the decision and opinion of the assessee was entirely unilateral, that it had not established the existence of any debate on the issue , that it had taken a calculated risk knowing it very well that there were only remote chances of such a wrong claim being allowed, that it had made an incorrect claim, that the contention of the assessee that allowability of deduction was a debatable issue was liable to be rejected. The FAA distinguished the cases relied upon by the assessee .

He referred to Explanation 1 to section 271(1)(c) (A) and (B) of the Act and held that the assessee had not offered any explanation that was not substantiated by it. He also held that the assessee had made a disclosure of income in computation of income about allowability of capital expenses but it was not able to provide and substantiate the basis of the said claim. He further observed that the assessee had even claimed depreciation on the capital assets which had been written off by claiming the full expenditure, that during the assessment proceedings the assessee was asked to provide the basis of the claim made with regard to allowability of capital expenditure, that in support of its claim the assessee had advanced only theoretical arguments, that no conflicting jurisprudence was brought to light on the issue, that claim of depreciation alongwith the claim of full deduction of expenses of the capital assets could not by any stretch of imagination be supported by any accounting standard or principles, that it was virtually prohibited by all accounting norms the world over,that assessee had blatantly defrauded the Revenue, that it was the most appropriate case of furnishing inaccurate particulars of income.He referred to the case of Steel Ingots Ltd.(296ITR228),P.K. Narayanan (238ITR905), B.A Balasubramanium and Brothers & Co.(236ITR997) and held that as a matter of policy the department was taking only 1-3% of cases for scrutiny, that as the case has not been selected for investigation, there would have been loss of revenue on account of erroneous and unsupported claim of the assessee, that the assessee had furnished inaccurate particulars of income. Finally the FAA upheld the order of the AO.

4.Before us,the Authorised Representative(AR)stated that the assessee had agitated the quantum addition upto the AY.1999-2000 before the Tribunal,that after that it did not challenge the additions made in quantum proceedings, that in earlier years the AO had not

levied any penalty even after initiating the proceedings,that the assessee had made full disclosure of all the relevant facts.He referred to page No.91 and 104 of the PB.He further argued that it was debatable issue as per the order of the Tribunal (Pg-22 to 27 of the PB), that the assessee had interpreted the provisions of the Articles as per its understanding that depreciation was not an expenditure, that non-levy of penalty by the AO in the earlier years showed that there was doubt in the mind of the AO, that double deduction could not lead to levy of penalty.He referred to the cases of Infosys Technologies Ltd. (360ITR714) and Rucha Engineers Pvt.Ltd.(90CCH232).He also argued that in Article 7(3) of Indo Singapore Treaty further restrictions were made which were not in the Indo Mauritius Treaty, that the assessee had not contravened the provisions of section 271(1)(c).

The Departmental Representative(DR) referring to Article 7(3) of the treaty argued that the purchase of fixed assets had to be dealt as per provision of the Act, that assessee had not only claimed deduction of capital expenditure, but had also claimed depreciation, that the treatment given by the assessee in its books of account were based on basic principles of taxation . He referred to the case of Zoom Communication P. Ltd. (327ITR510) and N.G. Technologies (240Taxman6).

5.We have heard the rival submissions and perused the material before us.We find that the assessee had acquired capital assets during the year under appeal,that it had claimed that expenditure incurred for purchasing the said assets was allowable as revenue expenditure as per the provisions of the Indo- Mauritius DTAA,that it had claimed depreciation for the assets in question,that the appeals for earlier years for quantum additions were decided against the assessee, that the AO levied penalty u/s.271(1)(c)of the Act for filing inaccurate particulars of income for the year under consideration and the FAA upheld the same.

5.1. Before proceeding further,we would like to mention that the object behind the enactment of Sec.271(1)(c) of the Act is to provide for a remedy for loss of revenue and it is a civil liability.Courts are of the opinion that imposition of penalty u/s.271(1)(c) is not akin to or like criminal proceedings and the question of mens rea or mala fides on the part of the assessee need not be examined and is not relevant.In such cases,it has to be examined as to what was the explanation of the assessee during the penalty proceedings and whether same could be treated a bona fide explanation.In other words,if an assessee fails to offer the explanation about filing of inaccurate particulars or concealing the particulars of income,or he offers the explanation which is found by the authorities to be false,or he offers explanation

which he is not able to substantiate and fails to prove that such explanation is bona fide then penalty u/s.271(1)(c) of the Act can be imposed.We would also like to mention that the words 'particulars' and 'inaccurate' in the said section of the Act mean that particulars which are not accurate,not exact or correct or not according to truth or erroneous are to be considered inaccurate particulars.

The facts of the instant case are that expenditure incurred on account of capital assets was claimed as revenue expenditure and depreciation was also claimed.In short,the assessee had claimed double deductions.It is not a case where the view taken by the assessee required consideration or it was a reasonably arguable case.There was no justification on part of the assessee to claim both the deductions. Depreciation,as per the established principles of tax jurisprudence,is an allowable deduction for wear and tear of assets.It was not a case where the assets purchased by the assessee were of the nature where 100% depreciation was allowable and it had claimed the same.The assets in question were capital assets and the assessee was aware of the fact.Even then it tried to interpret the provisions of the DTAA in its own manner and made the claim in the return of income.

5.2. In our opinion,mere recording of the notes in the return cannot absolve and protect the assessee who had not furnished accurate particulars.If the explanation and the reasoning of the assessee is accepted, then in all cases where a note is made in a return,but a wrong claim of deduction is made,no penalty u/s.271(1)(c) of the Act can be imposed.Merely because the assessee complies with the statutory procedural requirement of filing the prescribed form and certificate of the Chartered Accountant,cannot absolve the assessee of its liability if the act or attempt in claiming the deduction is not bona fide.

Bona fide of a claim can be proved by the circumstances and facts.If the assessee had anything in its favour-in form of a commentary,an opinion of a tax expert dealing with such issues at international level,or an order of any legal forum to hold that capital expenses can be claimed as revenue expenditure and depreciation can be claimed for such an expenditure-stand taken by it would have been taken as bonafide belief.Here,the assessee claims it interpreted the DTAA and decided that it was eligible for a particular deduction.Thus,it has acted as an interpreter of law and a judicial authority.As per the judicial procedure only and only the Courts are authorised to interpret the law. The assesseess,AO.s,FAA.s and even the Tribunal cannot interpret the law.It is out of their domain.The assessee had interpreted the Treaty for its own benefit resulting in paying lesser taxes.It is not a case where the assessee

makes a claim during the assessment proceedings after paying taxes about the claims for which it had some doubt.If an assessee interprets provisions of law without any legal basis and resultantly deprives the State of its due taxes it is a case of filing of inaccurate particulars.We agree that the Act is one of most vexed and complicated legislation and has been subjected to numerous amendments from time to time,that it requires highest degree of interpretative skills and divergent views on interpretation of tax provisions,that law does not postulate that an assessee must accept an interpretation against him even when a favourable view is credible and tenable.But,the facts of the case prove that no judgment or opinion was brought to notice of the revenue authorities indicating that the stand taken by the assessee was based on some reasonable basis.In our opinion,the claim made by it falls under the category of a 'fanciful claims under the garb of interpretation',and same is not bona fide.

5.3. We also want to mention that the confirmation of the order of the AO by the FAA and Tribunal in the quantum proceeding has any relevance in deciding the penalty proceedings before us.We hold that the assessment and penalty proceedings are separate and independent and the decision of levying or confirming the penalty should be taken on the basis of the explanation filed during the penal proceedings. In our opinion,if the claim itself is not bona fide-that it lacks good faith-then penalty has to be imposed for filing inaccurate particular. Information in the return was given to gain some tax advantage which was otherwise not due to the assessee and such an attempt has to be termed filing of inaccurate particulars.

5.4. Intention of the assessees in claiming capital expenditure as allowable expenditure and further claiming depreciation is visible to the proverbial 'naked eyes' ,so, if the AO/FAA decided not to remain a mute spectator to such an attempt,no fault can be found with them.The FAA has in his elaborate order clearly proved that as to how the explanation of the assessee was not genuine or bona fide and how it is not supported by any authority.Rather the available material was against the stand taken by the assessee. It is also a fact that the assessee not a small time trader running a proprietary concern or a shop in the remote part of the country and is not aware of the tax laws.It is supported by a team of professionals.Such assessees are expected to lead from front and not to claim deductions that are prima facie not admissible.Let us make it clear that we do not want to mix ethics and penalty matters.What we are emphasising is that assessee availing professional services should not make claims that are prima facie inadmissible to avoid penal consequences.We would also like to mention that the cases relied upon by the assessee are distinguishable on facts.In the case of Infosys

Technologies Ltd.the issue was not about levy of penalty u/s.271(1)(c)of the Act.In the matter of Rucha Engineers Pvt.Ltd.(supra)the FAA deleted the penalty holding that in a case where the issue was the nature of the receipt i.e. capital or revenue receipt penalty should not be levied.The order of the FAA was confirmed by the higher forums.In short,both the cases are of no help to the assessee.In contrast,the matter relied upon by the DR,i.e.N.G. Technologies (supra)is useful in deciding the issue In that matter the assessee had pleaded that claim made by it was bonafide and all the facts were disclosed.The FAA,upholding the order of the AO, had held that mistake committed by the assessee could not be said to be bonafide.However, the Tribunal reversed the order of the FAA.The Hon'ble Apex Court dismissed the SLP against High Court's ruling that where against basic principle of accountancy, assessee claimed capital loss on sale of fixed assets in profit and loss account and had not revised return voluntarily, penalty for concealment of income was justified.In our opinion,facts of the case under consideration are quite similar to the facts of N.G. Technologies (supra).

Considering the peculiar facts and circumstances of the case cumulatively,we hold that order of the FAA does not suffer from any legal or factual infirmity.Therefore, upholding the same,we decide the effective ground of appeal against the assessee.

ITA.s/3140-41/Mum/2008 & 1194/Mum/2010,AY.s. 2001-02 to 2002-03 &2004-05

6.Following our order for the AY.2000-01,we decide the remaining three appeals against the assessee,as the facts of the case are same as dealt in the appeal for that assessment year.

As a result,appeals filed by the assessee stands dismissed.

फलतः निर्धारिती द्वारा दाखिल की गई अपीलें नामंजूर की जाती हैं.

Order pronounced in the open court on 30th September, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 30 सितंबर, 2016 को की गई।

Sd/-	**Sd/-**
(अमित शुक्ल/ **Amit Shukla**)	(राजेन्द्र / **Rajendra**)
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांकDated : 30. 09.2016.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "L " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**,** एल खंडपीठ,आ.अ. अधि.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**