

**IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI
BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT
&
HON' BLE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

**ITA No.4702/Mum/2018
(Assessment Year: 2007-08)**

Biax Electric & Controls Pvt.Ltd. Gala No.108A, Rizvi Chambers, Hill Road Near Lucky Hotel Bandra West Mumbai-400 050	Vs.	ITO-9(1)(2) 2 nd Floor Aaykar Bhawan Mumbai-400 020
PAN/GIR No.AABCB6347D (Appellant)	..	(Respondent)

Assessee by	Shri. N.R.Agarwal, AR
Revenue by	Ms. Samatha Mullamudi, JCIT-DR
Date of Hearing	16/06/2020
Date of Pronouncement	16/06/2020

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against order of the Ld. Commissioner of Income tax (Appeals)- 20, Mumbai, dated 29/06/2018 and it pertains to Asst.Year 2007-08.

2. The assessee has raised the following grounds of appeal.

Ground NO.1 *The learned CIT(Appeals) erred in confirming the penalty u/s 271(1)(c) on addition of wrong claim u/s 80IB of Rs.14,61,994/- made by assessee in the return & surrendered during scrutiny proceedings.*

Ground No.2 *The learned CIT(Appeals) erred in not giving any decision on alternate submission about noticed issued by AO u/s 271(1)(c) without striking off irrelevant limb in the penalty notice confirming the penalty u/s 271(1)*

3. The brief facts of the case are that the assessee has filed its return of income for Asst.Year 2007-08 on 28/11/2007, declaring total income at Rs.Nil, after claiming deduction u/s 80IB(4) of the Income Tax Act, 1961 amounting to Rs. 91,83,987/-. The assessment has been completed u/s 143(3) of the I.T.Act, 1961 on 21/12/2009 and determined total income at Rs.1,42,48,927/- and in the assessment, the Ld. AO has disallowed the claim of deduction u/s 80IB(4), amounting to Rs.91,83,987/-. The assessee has carried the matter in appeal before the first appellate authority and the Ld.CIT(A) for the reasons recorded in his appellate order, dated 14/06/2011 has allowed partial relief in respect additions made by the Ld. AO towards disallowances of deduction claimed u/s 80IB(4), in respect of manufacturing activity amounting to Rs.56,99,348/-. However, the claim in respect profit derived from trading activity, as well as export incentive/DEPB reimbursement was disallowed to the extent of Rs.34,84,639/-. Thereafter, the Ld. AO has initiated penalty proceedings u/s 271(1)(c) of the I.T.Act, 1961 and after considering relevant submissions of the assessee has levied penalty of Rs.11,80,000/-, which is equivalent to 100% of tax sought to be evaded on account of wrong deductions claimed u/s 80IB(4) towards trading profit, as well as DEPB license.

4. Being aggrieved by the penalty order, the assessee has filed an appeal before the Ld.CIT(A). Before, the Ld.CIT(A), the assessee submitted that mere making a claim of deduction u/s 80IB(4), which was not allowed or substantiated cannot be considered as concealment of particulars of income or furnishing inaccurate particulars of income, which warrants levy of penalty u/s 271(1)(c) of the I.T.Act, 1961. The Ld.CIT(A) after considering relevant

submissions of the assessee, has confirmed penalty levied by the Ld. AO towards wrong claim of deduction u/s 80IB(4), in respect of trading profit amounting to Rs.14,61,984/-, on the ground that when the law is very clear, in respect of eligibility for deduction, making a claim on non eligible profit u/s 80IB(4) cannot be considered as a bonafied mistake. Insofar as, deduction claimed towards DEPB/export incentives, the Ld.CIT(A) has deleted penalty levied by the Ld. AO, on the ground that excess claim of deduction arising from export incentive can be considered as bonafied mistake. The relevant findings of the Ld.CIT(A) are as under:-

*5.1 I have considered the rival submissions. The submissions made by the AR regarding the wrong claim arising out of inclusion of trading profit in the deduction claimed u/s 80IB(4) of the Act has been considered. Wrong claim of deduction u/s 80IB of the Act on trading income was surrendered only during the remand proceedings, after disallowance was made in the assessment order. Further, the appellant cannot be allowed to use its Auditor as a shield against the imposition of penalty for making wrong claim of deduction in the return that the trading profit is not eligible for deduction u/s 80IB(4) is manifestly clear from the language of the section and there is no ambiguity whatsoever on this issue. The AR of the appellant has failed to furnish any bonafied explanation with regard to claim of excess deduction on trading profit. As regards the appellant's reliance on the decision of the Hon'ble Supreme Court in the case of Price waterhouse Coopers Pvt.Ltd. versus CIT 348 ITR 306(SC), I am unable to record a finding that the claim was to a bona fide mistake. **Therefore, the case law cited by the appellant is not applicable to this case. Therefore, the penalty imposed on four wrongly including trading profit in the deduction claimed u/s 80IB(4) amounting to Rs.14,61,94/- is confirmed.***

*5.2 The explanation of the appellant regarding the inclusion of the profit from DEPB/Export incentives in the deduction claimed u/s 80IB(4) of the Act is found to be acceptable. **Accordingly , penalty imposed on account of excess claim of deduction u/s 80IB(4) arising from inclusion of Export incentive/DEPB license of Rs.20,22,645/- is deleted***

5. The Ld. AR for the assessee submitted that the Ld.CIT(A) has erred in sustained penalty levied by the Ld. AO towards claim of

deduction u/s 80IB(4) of the Act, in respect of trading profit, without appreciating the fact that mere making a claim, which was not substantiated cannot lead to a conclusion that the assessee has made deliberate attempt to conceal particulars of income, which warrants levy of penalty u/s 271(1)(c) of the Act. In this regard, he relied upon the decision of Hon'ble Supreme Court, in the case of CIT s Reliance Petro Products Pvt.Ltd. 322 ITR 158(SC) and CIT vs Price Waterhouse Coopers 348 ITR 306 (SC).

6. The Ld. DR, on the other hand strongly supported order of the Ld.CIT(A) and further submitted that the assessee has made a wrong claim of deduction towards trading profit, even though the law is very clear, in respect of claim of deduction u/s 80IB(4) of the Act, where it is clearly specified that only a manufacturer of goods and articles is eligible for claim of deduction. The Ld.CIT(A) has rightly confirmed penalty levied by the Ld. AO and his order should be upheld.

7. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. There is no dispute with regard to the fact that the assessee has claimed deductions towards trading profit u/s 80IB(4) of the I.T.Act, 1961. But, whether the claim made by the assessee is a bonafied mistake or a deliberate attempt made to conceal the particulars of income within the meaning of section 271(1)(c) of the I.T.Act, 1961 has to be examined. The assessee claimed that it has made a claim of deduction, on the basis of report of Chartered Accountant issued in Form 10CCB, where the accountant, who audited books of accounts has certified that profit derived from trading activity is also eligible for

deduction u/s 80IB(4) of the I.T.Act, 1961. On perusal of the reasons given by the assessee for making a claim of deduction u/s 80IB(4), we find that the assessee was prompted to go for making a claim as per the report of auditor given in Form 10CCB, which is in our considered view is a bonafied mistake and the same cannot be considered as a deliberate attempt made for concealment of particulars of income to levy penalty u/s 271(1)(c) of the I.T.Act, 1961. We, further noted that the Hon'ble Supreme Court, in the case of CIT vs Reliance Petro chemicals products Pvt. Ltd.(supra) has held that making a claim, which is not substantiated cannot be considered as deliberate attempt to concealment of particulars of income, which warrants levy of penalty u/s 271(1)(c) of the I.T. Act, 1961. A similar view has been expressed by the Hon'ble Supreme Court, in the case of CIT vs Price Waterhouse Coopers (supra), where the assessee has made a claim on the basis of tax audit report of auditor and the same has been found to be not allowed and the Ld. AO has made additions. Under those facts, the Hon'ble Supreme Court came to the conclusion that mere making a claim, which is not substantiated that too on the basis of report of auditor cannot be considered as concealment of particulars of income. In this case, there is no doubt of whatsoever with regard to the claim of the assessee towards trading profit and such claim is solely based on the report of auditor in Form No. 10CCB. Therefore, we are of the considered view that the claim made by the assessee towards deduction u/s 80IB(4) is a bonafied mistakes, for which the penalty provisions provided u/s 271(1)(c) cannot be invited. The Ld. AO without appreciating the facts has levied penalty on such additions. Hence, we direct the Ld. AO to delete penalty levied u/s 271(1)(c) of the I.T. Act, 1961, in respect of additions made towards

disallowances of deductions claimed u/s 80IB(4) of the Act, in respect of trading profit.

8. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on this: 16/06/2020

Sd/-
(MAHAVIR SINGH)
VICE PRESIDENT

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated: 16/06/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai