

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E', NEW DELHI)**

**BEFORE SHRI N K SAINI, ACCOUNTANT MEMBER
AND SMT. BEENA A. PILLAI, JUDICIAL MEMBER**

I.T.A. No.5866/Del/2013
(Assessment Year 2005-06)

Oriental Bank of Commerce, Vs. ACIT, Circle 13(1),
Central Accounts Officer, Plot No.5, New Delhi
Sector 32, Industrial Area,
Gurgaon
GIR / PAN : **AAACO0191M**

I.T.A.No. 6068/Del/2013
(Assessment Year 2005-06)

ACIT, Circle 13(1), Vs. Oriental Bank of Commerce,
New Delhi Central Account Office,
Plot No.5, Sector 32,
Gurgaon

(Appellant)

(Respondent)

Appellant by :Shri KVSr Krishna CA

Respondent by :Shri Sunil Chander Sharma, CIT DR

Date of hearing: 07.06.2016

Date of Pronouncement: 10.06.2016

ORDER

PER BEENA A. PILLAI, JM:

The present cross appeals have been filed by the assessee as well as Revenue against the order dated 16.08.2013 passed by Ld. CIT(A) XVI New Delhi for the Assessment Year 2005-06 on the following grounds of appeal:

A. I.T.A.No. 5866/Del/2013:

“1. The Ld CIT(A) has erred in law and on facts in confirming the penalty u/s 271 (1)(c) on claim of depreciation on Temporary Wooden structures like interiors, glow signs etc; taken over from Erstwhile GTB upon amalgamation pursuant to GOI notification, of Rs. 7,13,13,797/- @ 100%. The penalty levied is wrong and bad in law and has to be deleted.

2. The appellant contends that it had offered explanation which has not been found to be false nor unsubstantiated. The explanation is supported by facts and details as well as legal provisions for claim of depreciation in the case of amalgamation. Therefore, the allegation of the CIT(A) as well as AO that the assessee has furnished inaccurate particulars of income is wrong and bad in law and on facts. There is no case for levy of any penalty u/s 271(1)(c).

3. The CIT(A) has failed to appreciate that the erstwhile Global Trust Bank was amalgamated into OBC on 14.8.2004 by the Govt. of India u/s 45(7) of the Banking Regulation Act to safeguard the interest of the deposit holders. Therefore, the entire assets Block, stock and barrel at WDV became the actual cost to OBC Pursuant to such amalgamation read with sec. 43(6) clause (c) Explanation 2(b). The assessee has applied the depreciation rates on such assets as applicable to such assets i.e. 100% on purely temporary erections such as wooden structures as prescribed in Income tax Rules, 1962. Therefore, there is no furnishing of inaccurate particulars of income. The penalty should be deleted.

4. The appellant contends that in the above scheme of amalgamation approved by the GOI and RBI, the assessee was mandated to review the assets and take over at WDV as per books or at realizable value. The assets described under furniture & fixtures

namely glow signs, interiors of the erstwhile bank has nil value and should be written off 100% which has been done by the assessee. Therefore, the claim made by the assessee is bonafide and no penalty should be levied.

5. Without prejudice, whether the assessee would be allowed depreciation on temporary wooden structures @15% or 100% is a debatable issue and cannot be called as a ground for levying penalty. The CIT(A) has failed to appreciate that the depreciation claimed by the bank in the case of amalgamation is governed by section 43(1), 43(6) Explanation 2 as well as section 32. The AO has mechanically substituted rate of depreciation @ 15% instead of 100%. Therefore also on such debatable issue, no penalty should be levied.

6. The above grounds are independent and without prejudice to one another.”

2. Ld. Assessing Officer has initiated penalty proceedings on a claim of depreciation by the assessee as the Ld. A.O. found explanation offered by the assessee to be false / unsustainable. Ld. A.R. submitted that this Tribunal in I.T.A. No. 21/Del/2011 in assessee's own case, for the quantum appeal, has deleted the disallowance made by the Assessing Officer on account of depreciation. The Hon'ble Tribunal held as under:

“5. We heard the rival submission and perused the material on record. In the present appeal, we are required to adjudicate whether the Assessing Officer was justified in exercising the jurisdiction under Section 154 of the Act or not. The Assessing Officer withdrawn the depreciation to the extent of Rs.12,14,26,196/- on interior temporary wooden

structures. The Assessing Officer at the time of original assessment after going through the details filed by the assessee bank allowed the depreciation @ 100%, whereas vide the impugned proceedings, the Assessing Officer allowed the depreciation only @ 15% treating as a furniture and fixtures and the balance of depreciation claim of Rs.12,14,26,126/- was withdrawn by him vide order dated 30.11.2007 passed under Section 154 of the Act. The sole ground, on which the Assessing Officer exercised the power of rectification is that in the hands of Global Trust Banks Ltd. which had been amalgamated with the assessee bank on 14th August, 2004 vide Government of India notification dated 13th August, 2004, the depreciation was allowed @ 15 till the date of amalgamation. In our considered opinion, this reasoning does not enable the Assessing Officer to exercise the jurisdiction under Section 154 of the Act. There is no specific provision under the provisions of Income Tax Act that the depreciation on the assets acquired pursuant to the scheme of amalgamation should be allowed at the same rate of depreciation which was allowed in the hands of the amalgamating company. There is nothing on record to show that the assessee bank is not entitled for depreciation @ 100% in respect of the interiors which was purely wooden structures and the full details in respect of this claim of the expenditure have been filed at the time of original assessment proceedings. The Assessing Officer after considering the details filed allowed the claim in the original assessment proceedings. In the circumstances, the claim for deduction of depreciation cannot be withdrawn by exercising power under Section 154 of the Act based on the change of opinion. The Hon'ble Supreme Court in the case of Mepco Industries Ltd. Vs. CIT, 319 ITR 208, held that the right to rectify the mistakes under Section 154 of the Act cannot be invoked in the case of change of opinion. A rectifiable mistake is a mistake which is obvious and patent and not something which has to be established by a long drawn process of reasoning or where two opinions are

possible. Further, in our opinion, the issue at what rate a particular asset is eligible for depreciation per se is a debatable issue as it requires examination of materials, details, particulars and application of mind and therefore it cannot be a subject matter of rectification under Section 154 of the Act. The Hon'ble Madras High Court in the case of CIT Vs. New Woodlands Hotel (P.) Ltd., (2015) 228 Taxmann 360 (Mad.) held that in a case where 100% depreciation was allowed in the assessment proceedings on vapor absorption machine and the Assessing Officer by exercising the power under Section 154 of the Act sought to allow depreciation @25% on the ground that the said machine was a part of centralized air condition. The High Court held that such power cannot be exercised as it is a debatable issue which requires the examination of material details, particulars and application of mind. Similarly, the Hon'ble Supreme Court in the case of CIT Vs. Hero Cycle Pvt. Ltd., 228 ITR 463 held that the rectification under Section 154 can only be made when a glaring mistake of fact or law committed by the Officer passing the order as apparent from the record. Rectification is not possible when question is debatable. Moreover, a point which was not examined on the facts or in law cannot be dealt with as a mistake apparent from the record. Therefore, following the ratio laid down in the above case, we hold that the issue whether the depreciation @100% or 15% on interiors which are purely wooden structures is a debatable point as it requires examination of details and cannot be rectified by exercising the power vested under Section 154 of the Act. Therefore, we quash the order of the Assessing Officer dated 30th November, 2007 passed under section 154 of the Act and allow this ground of appeal.”

3. On perusal of above order in the quantum appeal, in assessee's own case, it is observed that the order passed u/s 154 of the Act date 30.11.2007 has been quashed by

this Tribunal. This Tribunal has observed that the issue relating to depreciation is a debatable issue as it requires examination of details and cannot be rectified u/s 154 of the Act. As the order under which disallowance of depreciation was made, stands cancelled by this Tribunal, the penalty proceedings initiated in respect of the same cannot be sustained. We accordingly quash the penalty order passed by the Assessing Officer. Accordingly, the grounds raised by the assessee in this appeal, stands allowed.

3.1 In the result, appeal filed by the assessee stands allowed.

B. I.T.A.No. 6068/Del/2013:

“On the facts & in the circumstances of the case, the Ld. (IT(A) has erred in reducing the penalty by Rs.2,60,93,718/- imposed by the assessing officer u/s 271(1)(c) of the Act on account of wrong claim of brought forward losses/unabsorbed depreciation.

1.1 On the facts & in the circumstances of the case, the Ld. (IT (A) has erred in not appreciating the fact that the addition was confirmed by the first appellate authority.

1.2 On the facts & in the circumstances of the case, the Ld. (IT (A) has erred in not appreciating the fact that in quantum appeal the first appellate authority has well established the factor that the assessee had misappropriated with the figures at the time of filing of return.”

4. The revenue has preferred this appeal before us against the penalty being deleted in respect of claim being

disallowed relating to depreciation on account of furniture and fixtures.

4.1 Ld. CIT(A) while dealing with this issue, in its order has held as under:

“5. So far as the second issue is concerned, at the time of filing of return by OBC the losses of EGTB of Rs. 111,45,95,050/- which were available for set off were claimed in the return. However, upon subsequent assessment of EGTB, the losses were assessed at Rs.54,38,96,252/-. Therefore, there was consequential reduction in the set off of losses of EGTB. The additions made in the case of EGTB for the A Y 2005-06 were deleted by the appellate authorities except the claim of depreciation on "Furniture and Fixture" of Rs.7,13,13,797/-. After appeal effect, the losses of EGTB eligible for setoff against the appellant is Rs.104,32,81,253/- (Rs.111,45,95,050/- minus Rs.7,13,13,797/-) as against the returned loss of Rs.111,45,95,050/-. Further, the balance of Rs.7,13,13,797/- is consequent to addition in the assessment of EGTB and has been considered for levy of penalty in the hands of EGTB. So far as OBC is concerned it is only giving effect to the losses of EGTS which are available to OBC. In view of the above the disallowance of excess setoff of losses of Rs.7,13,13,797/- being on account of additions made in the hands' of EGTS, therefore, the disallowance cannot be considered as concealment of particulars of income or furnishing of inaccurate particulars of income by the appellant. Therefore, I am of the considered opinion that penalty u/s 271 (1)(c) is not imposable upon the appellant in respect of disallowance of excess set off of losses of Rs.7,13,13,797/- on account of additions made in the hands of EGTB.”

4.2 Ld. D.R. submitted that the penalty levied must be confirmed as the addition has been confirmed by the first appellate authority in its order u/s 143(3) of the Act.

4.3 On the contrary, Ld. A.R. submitted that Ld. CIT(A) in the impugned order has held that the disallowance made by the Ld. A.O. was in respect of excess set off of losses being on account of addition made in the hands of assessee. He submitted that Ld. CIT(A) has held that such disallowance cannot be considered as concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee.

4.4 Ld. A.R. further submitted that the issue was not raised before this Tribunal considering the disallowance being accepted.

4.5 We have perused the orders of authorities below and have observed that Ld. CIT(A) has categorically observed that such disallowance of excess set off cannot be considered as concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee. Merely because the issue was not raised before the Tribunal in quantum appeal, it cannot be concluded that the penalty can be levied on such disallowance. We are in total agreement with the finding of Ld. CIT(A) and are not inclined to interfere with it. Accordingly, the grounds raised by the Revenue in this appeal stand dismissed.

5. In the result, appeal filed by the assessee is allowed and that of the Revenue stands dismissed.

Order pronounced in the open court on 10th June, 2016.

Sd./-
(N. K. SAINI)
ACCOUNTANT MEMBER
Date: 10.06. 2016

Sd./-
(BEENA A. PILLAI)
JUDICIAL MEMBER

Sp.

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknaya Bhawan, Khan Market, New Delhi.

True copy.

By Order
(ITAT, New Delhi)

| S.No. | Details | Date | Initials | Designation |
|-------|--|----------|----------|-------------|
| 1 | Draft dictated on | 7/6 | | Sr. PS/PS |
| 2 | Draft placed before author | 8/6 | | Sr. PS/PS |
| 3 | Draft proposed & placed before the Second Member | | | JM/AM |
| 4 | Draft discussed/approved by Second Member | | | AM/AM |
| 5 | Approved Draft comes to the Sr. PS/PS | 10/06/16 | | Sr. PS/PS |
| 6 | Kept for pronouncement | 10/6 | | Sr. PS/PS |
| 7 | File sent to Bench Clerk | 15/6 | | Sr. PS/PS |
| 8 | Date on which the file goes to Head Clerk | | | |
| 9 | Date on which file goes to A.R. | | | |
| 10 | Date of Dispatch of order | | | |