

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E, 'MUMBAI**

**BEFORE SHRI RAJENDRA, HON'BLE ACCOUNTANT MEMBER AND
SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER**

**ITA No. 7552/MUM/2014
(Asst. Year : 2007-08)**

DCIT-8(3), R.No. 615, Mumbai.	Vs.	M/s. 3 D Technopeck Ltd., 306, Jaswanti Land Mark, Mehra Industrial Estate, LBS Marg, Vikhroli (W), Mumbai - 79
(Appellant)		PAN No. AAACV 0142 R (Respondent)

Assessee by	:	Shri Paras S. Savla & Shri Pratik B. Poddar – Adv.
Department By	:	Shri N. Satya Moorthy - DR
Date of hearing	:	21/07/2016.
Date of pronouncement	:	19/10/2016.

ORDER

PER C.N. PRASAD, JUDICIAL MEMBER

This appeal is filed by the Revenue against the order of the Id.CIT(A)-13, Mumbai dated 29/10/2014 for the Assessment Year 2007-08 in deleting the penalty levied under section 271(1)(c) of the Act.

2. Brief facts of the case are that the assessee is engaged in the business of manufacturing of seamless plastic tubes and caps, filed its return of income on 25/10/2007 declaring loss of Rs. 2,85,42,990/-. The assessment was completed under section 143(3) on 31/12/2009 determining the loss at Rs. 2,64,11,250/-. Subsequently, the

assessment was reopened by issuing notice under section 148 on 28/03/2012 and the reopened assessment was completed 143(3) read with sec. 147 of the Act on 11/03/2013. While completing the re-assessment, the Assessing Officer denied set off of unabsorbed depreciation of Rs. 3,16,06,933/- pertaining to Assessment Years 1997-98 & 1998-99 to be carry forward for subsequent years. It was the contention of the Assessing Officer that the depreciation pertaining to Assessment Years 1997-98 & 1998-99 got lapsed in the relevant Assessment Year 2007-08 for the reason that such depreciation cannot be carried forward for more than eight years. The assessee contended that section 32(2) was amended by Finance Act, 2001 w.e.f. Assessment Year 2002-03 to restore the position as it was prevailing prior to the Finance Act No.02/1996 and the period of eight years was done away with and assessee is eligible to claim for unabsorbed depreciation of Assessment Years 1997-98 & 1998-99 to be carried forward and set off of without any time limit. However, the assessee's contention had not been accepted by the Assessing Officer by observing that the Finance Act 1996 with effect from Assessment Year 1997-98, restricted the right to carry forward unabsorbed depreciation for a period of eight years from the year in which original unabsorbed depreciation which could not be set off of due to inadequacy of profits. Thus, he held that in view of the decision of Mumbai Bench in the case of *DCIT Vs. Times Guaranty Limited* in ITA No. 4917 & 4918/Mum/2008, the unabsorbed depreciation prior to 2002-03 cannot be dealt with amended provisions dealing with unabsorbed depreciation where bar to carry forward was rescinded from eight years to infinite period. Simultaneously, the penalty proceedings were initiated requiring the assessee to explain as to why penalty should not be levied under section 271(1)(c) for furnishing in accurate particulars of income and concealed income. The order under section 271(1)(c) passed later imposing penalty on the withdrawal of unabsorbed to be carried forward.

3. The assessee preferred appeal before the Id. CIT(A), who deleted the penalty holding that the assessee has adopted one of the two possible views prevailing at that time and which was later decided by higher legal forum i.e. Hon'ble Gujarat High Court in favour of the assessee.

4. The Departmental Representative vehemently supported the order of the Assessing Officer in imposing the penalty under section 271(1)(c) on the withdrawal of set off of carry forward of depreciation relating to Assessment Years 1997-98 & 1998-99 against income from Assessment Year 2007-08.

5. The Authorized Representative of the assessee placed reliance on the decision of the Id. CIT(A). He further submitted that there are two views possible in this matter and in fact, the Gujarat High Court affirmed the view of the assessee observing that the unabsorbed depreciation should be carried forward indefinitely and should be set off against the profits even after the Assessment Year 2002-03 in view of the fact that the Legislature has amended the provisions of section 32(2) by Finance Act 2001 with effect from Assessment Year 2002-03 wherein the right to carry forward unabsorbed depreciation gets merged with depreciation of current year as per the provisions of section 32(1) of the Act and as a natural corollary, the bar of eight years stands withdrawn.

6. We have heard rival submissions, perused the orders of the authorities below. In this case, we find that the assessment was reopened for withdrawal of set off of unabsorbed depreciation relating to Assessment Years 1997-98 & 1998-99 based on the decision of the Mumbai Bench in the case of *Times Guaranty Limited* (supra), wherein it was held that unabsorbed depreciation loss for 1997-98 & 1998-99

cannot be carried forward beyond the period of eight years. Subsequently, we find that the Hon'ble Gujarat High Court in the case of *General Motors India Pvt. Ltd. Vs. DCIT*, order dated 27/04/2012 held that the depreciation pertaining to Assessment Year 1997-98 & 1998-99 can be carried forward beyond the eight years by virtue of the amendment to Finance Act 2001 to section 32(2) with effect from Assessment Year 2002-03 wherein the position as it was prevailing prior to Finance Act No.2/1996 in the period of eight years for carry forward of unabsorbed depreciation was done away with and allowing the claim for unabsorbed depreciation of Assessment Year 1997-98 & 1998-99 to be carried forward and set off of without any time limit was restored. In this case, we see that there is no concealment of particulars of income or furnishing inaccurate particulars of income, but the claim was disallowed based on the interpretation of the provisions and placing reliance on the case laws by the Assessing Officer. In this case, there are two views possible and the issue was highly debatable. The Id.CIT(A) deleted the penalty observing as under:-

"3.3 I have gone through the facts and submissions. It is not disputed that penalty has been levied on the amount of depreciation disallowed of Rs. 3,16,06,933/- pertaining to Assessment Years 1997-98 & 1998-99 following the ratio of decision; given in the case of Times Guaranty Limited (2010) 4 ITR (Mum.)(Trib.). It is also not disputed that the said decision was challenged before the Hon'ble Bombay High Court which was admitted in appeal No. 842/2011. Further, The Gujarat High Court in the case of General Motor India (P) Ltd. have also held that Circular No. 14 of 2001 clarified that restriction of 8 years for carry forward and set off of unabsorbed depreciation has been dispensed with and hence unabsorbed depreciation from Assessment Year 1997-98 can be carry forward and set off against income of Assessment Year 2006-07.

3.4 Thus, it is clear that the issue was clearly debatable and two view were possible. Undoubtedly the Assessing Officer followed the Hon'ble ITAT, Mumbai's decision for making addition under section 143(3), initiating penalty and consequently levying the same. I have considered the facts and submission. In the instant appeal, it is not disputed that the issue was debatable and two view were possible, out which the Assessing Officer has

taken first following Hon'ble ITAT, Mumbai decision, however that does not automatically attract penalty. It is not the case of Assessing Officer that the figures given in unabsorbed depreciation carried forward pertaining to various years and the claim made of set off against the income available, were not furnished or were furnished wrongly or there was any inaccuracy in the figures given for the claim made. There was obviously change in the losses assessed due to disallowance of depreciation on this account. However there is no case of concealment of income and as appellant took one of the two possible views prevailing that time which was decided by higher legal forum i.e. Hon'ble Gujarat High Court and submitted that to Assessing Officer also. Now as is the fact that the view taken by the appellant was upheld by higher forum and hence the stand taken by the Assessing Officer of disallowing the depreciation was not sustainable. Under these circumstances, levy of penalty on this given fact, being totally non-sustainable, cannot be upheld and hence the penalty levied @ 1000% for an amount of Rs. 1,06,38,894/- is deleted herewith."

7. On a careful reading of the order of the Id. CIT(A) and since there is no concealment of income or furnishing inaccurate particulars of income by the assessee in claiming set off of unabsorbed depreciation, no penalty under section 271(1)(c) is attracted. Thus, we sustain the order of the Id. CIT(A) in deleting the penalty levied under section 271(1)(c) of the Act.

8. In the result, appeal of the Revenue is dismissed.

Order Pronounced in the open Court on 19th October, 2016

Sd/-
(RAJENDRA)
Accountant Member

sd/-
(C.N. PRASAD)
Judicial Member

Dated : 19th Oct., 2016.

vr/-

Copy to:

1. *The Assessee.*
2. *The Revenue.*
3. *The CIT*
4. *The CIT(A)*
5. *The D.R.*
6. *Guard file.*

By order

//True Copy//

Assistant Registrar
I.T.A.T., Mumbai