

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

**BEFORE SHRI C.N.PRASAD (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)**

I.T.A. No.5980/Mum/2013
(Assessment Year: 2004-05)

ACIT 2(3),Mumbai	vs	M/s Tata Industries Ltd Bombay House 24 Homi Mody Street Mumbai-1
		PAN :AAACT4058L
(Appellant)		(Respondent)

Appellant by	Shri Sanjay Singh, CIT-DR
Respondent by	Shri Dinesh Vyas, Sr Counsel

Date of hearing : 08-09-2016
Date of pronouncement : 28 -09-2016

ORDER

Per ASHWANI TANEJA, AM:

This appeal has been filed by the revenue against the order of the Commissioner of Income-tax (hereinafter called [CIT(A)] dt 29-07-2013 passed against the penalty order of the AO U/S 271(1)(c) dt 30-03-2010 for A.Y. 2004-05 on the following grounds :

“On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:

1. (i) On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s 271(1)(c) of the IT

Act on the disallowance of professional fees of Rs. 19,44,000/- paid to M/s. S.B. Billimoria & Co. without appreciating that false claim of deduction was deliberate filing of inaccurate particulars and concealment of income and further concealment of income could not have been found if there were no scrutiny proceedings.

(ii) On the fact and in the circumstances of the case and in law. the Ld. CIT(A) erred in deleting the penalty u/s.271(1)(c) of the IT Act on the disallowance of professional fees of Rs. 19,44,000/- paid to M/s. S.B. Billimoria & Co., and treating the expenditure claimed as revenue expenditure when the assessee has paid the sum for valuation of shares, the income from which is determined under the head Capital Gains. whenever shares are sold.

(iii) On the fact and in the circumstances of the case and in the Ld. CIT(A) erred in deleting the penalty u/s.271(1)(c) of the IT Act on the disallowance of professional fees of Rs. 19,44,000/- paid to M/s. S.B. Billimoria & Co., when the quantum appeal was confirmed on the said issue.

2 . (i) On the fact and in the circumstances of the case and in law. the Ld. CIT(A) erred in deleting the penalty u/s.271(1)(c) of the IT Act on the disallowance of processing fees of Rs. 27,50,000/- paid to various banks for acquiring term loan, without appreciating the fact that the expenses on loan were claimed by the assessee as revenue expenditure when the assessee failed to explain the purpose of loan.

(ii) On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s.271(1)(c) of the IT Act on the disallowance of processing fees of Rs. 27,50,000/- paid to various banks for acquiring term loan, without appreciating that the loan funds are invariably utilized for the purpose promoting new companies and the same cannot be business / revenue expenditure.

(iii) On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s 271(1)(c) of the IT Act on the disallowance of processing fees of Rs.27,50,000/- paid to various banks for acquiring term loan, when the quantum appeal was confirmed on the said issue.

3.(i) On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s 271(1)(c) of the IT Act on the disallowance of processing fees of

Rs.4,85,000/- and treating the expenditure as revenue expenditure, and treating the expenditure as revenue expenditure when the AO has correctly disallowed the expenses since these were incurred to the new business venture held to be capital in nature.

(ii) On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s.271(1)(c) of the IT Act on the disallowance of processing fees of Rs.4,85,000/- and treating the expenditure as revenue expenditure, when the quantum appeal was confirmed on the said issued.

4.(i) On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s.271(1)(c) of the IT Act on the disallowance of excess carried forward of loss, and not accepting the basis of fact that neither in section 10A, Section 36 nor the section in Chapter VI prescribe anywhere that the deduction u/s. 1 OA is to be completely reduced from the business income.

(ii) On the fact and in the circumstances of the case and in law. the Ld. CIT(A) erred in deleting the penalty u/s.271(1)(c) of the IT Act on the disallowance of excess carried forward of loss, when the quantum appeal was confirmed on the said issued.

5. (i) On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s.271(1)(c) of the IT Act on disallowance of claim of Rs. 38.84 crore being provision for diminution in value of investments written back for the purpose of calculation of book Profit u/s I I 5JB, without appreciating that none of the clauses under Explanation to section 1 15JB provide for reduction of the write back of provision of investments from the net profits to arrive at the book profit.

(ii) On the fact and in the circumstances of the case and in law. the Ld. CIT(A) erred in deleting the penalty u/s.271(1)(c) of the IT Act on disallowance of claim of Rs. 38.84 crore being provision for diminution in value of investments written back for the purpose of calculation of book Profit u/s I I 5JB, when the quantum appeal was confirmed on the said issued.

(iii) On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s.271(1)(c) of the IT Act on disallowance of claim of Rs. 38.84 crore being provision for diminution in value of investments written back

for the purpose of calculation of book Profit u/s 15JB, without appreciating the fact that the assessee had not contested against levy of penalty on the similar issue for A.Y. 2000-01.

6. (i) On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s.271(!)(c) of the IT Act on disallowance of Rs. 9 crores being provision for contingency, without appreciating that none of the clauses under Explanation to section 15JB provide for reduction of the write back of provision of contingency from the net profits to arrive at the book profit.

(ii) On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s.271(l)(c) of the IT Act on disallowance of Rs. 9 crores being provision for contingency, when the quantum appeal was confirmed on the said issued.

7. (i) On the fact and in the circumstances of the case and in law. the Ld. CIT(A) erred in deleting the penalty u/s.271(l)(c) of the IT Act on disallowance of expenditure of Rs.22,14,030/- incurred for issue of debentures/bonds, without appreciating that the expenses incurred was capital in nature and not revenue.

ii. On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s.271 (l)(c) of the IT Act on the disallowance of processing fees of Rs. 22,14,030/- incurred for issue of debentures / bonds, when the quantum appeal was confirmed on the said issue.

iii. On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the penalty u/s 271(1)(c) of the IT Act on disallowance of expenditure of Rs.22,14,030/- incurred for issue of debentures / bonds, without appreciating that false claim of deduction was deliberate filing of inaccurate particulars and concealment of income and further concealment of income could not have been found if there were no scrutiny proceedings.”

2. During the course of hearing, Ld. Senior Counsel of the assessee submitted that in this case quantum order has been passed by the Tribunal for A.Y. 2004-05 dt 20-07-2016 in ITA No. 4894/Mum/2008 wherein most of the disallowances / additions made by the AO have

been deleted. It was informed that the additions / disallowances have been deleted by the Assessing Officer either in order passed u/s 154 or in the order giving effect to the appeal order. Per contra, Ld. DR relied upon the orders of the lower authorities.

With the assistance of both the parties, we have gone through the orders passed by the lower authorities as well as the order of the Tribunal passed in quantum appeal and decide the grounds raised by the revenue with respect to levy of penalty on various additions / disallowances as under:-

3. Ground 1: In this ground, the revenue has challenged the action of Ld. CIT(A) in deleting the penalty levied by the Assessing Officer on account of disallowance of professional fee of Rs.19,44,000 paid to M/s S.B. Billimoria & Co. It is noted that the aforesaid amount of professional fees was disallowed by the Assessing Officer on the ground that it was not allowable as business expenses u/s 37. But out of the said amount, a sum of Rs.16,20,000 has been directed to be allowed by Ld.CIT(A) in the quantum appellate order in computing the capital gain on sale of shares of Tata Autocomp Systems Ltd In A.Y. 2003-04, vide para 14 of his order dt 19-01-2007. It is further shown to us that balance sum of Rs/-3,24,000 had been allowed by the Assessing Officer himself in the assessment order for A.Y. 2004-05 in computing the capital loss on sale of shares of Automotive Stamping & Assemblies Ltd. Under these circumstances, we find that though the expenses were disallowed as business expenses, but the same have been allowed as expenses while computing taxable amount of capital gains / loss. It is further noted by us that entire claim was made by the assessee

making full disclosure and no facts were concealed or hidden. Though, the disallowance was made by the Assessing Officer as in his opinion, these expenses were not allowable u/s 37, but ultimately these have been found to be allowable under the head "capital gains". Under these circumstances, we find that the Ld. CIT(A) has rightly deleted the penalty. Nothing wrong could be pointed out by the Ld. DR in the reasoning given by the Ld. CIT(A) and, therefore, no interference is called for in the order of the Ld.CIT(A) and, therefore, ground 1 is dismissed.

4. Ground 2: In this ground, the Revenue has challenged the action of Ld. CIT(A) in deleting the penalty levied by the Assessing Officer on the disallowance of processing fee of Rs 27,50,000/- paid to various banks for acquiring term loans, etc. It is brought to our notice that this disallowance has been deleted by the Tribunal vide paras 33 & 34 of its order which reads as under:

"33. Ground No. 6:

During the year under consideration, the assessee had paid processing fees for acquiring the term loans from the Banks. The assessee claimed the said fees as business expenditure. The AO however, held that the loan funds were used for making investments in group companies and for promoting new companies hence the processing fees paid was capital expenditure. The Id. DR while relying upon the provisions of section 2 (28) of the Act has contended that the interest includes processing fees also.

34. We have already held in the earlier paragraphs of this order that the assessee being an investment & finance company and a promoter of new companies and having interest in the business of these companies has made the investments for business purposes for having control over these subsidiary and associated companies, hence, in the light of the proposition of law laid down by the Hon'ble Bombay High court in the case of "CIT, Panaji, Goa vs. Phil Corpn. Ltd."(supra), Hon'ble Delhi High

Court in the case of "Eicher Goodearth Ltd. vs. CIT" (supra) and the Hon'ble Supreme Court in "S.A. Builders vs. CIT" (supra), no interest disallowance is attracted u/s 36(iii) of the Act. On the same analogy, the processing fees paid by the assessee for obtaining such loans is also allowable as business expenditure. More over the issue is covered with the decision of the Hon'ble Supreme Court' in the case of India Cements Ltd. v. CIT [1966] 60 ITR 52, wherein the Supreme Court held that the expenditure in raising loans or issuing 52 ITA No.4894/Mum/2008 debentures would be revenue in nature, irrespective of whether the borrowing is a long term or short term one. This issue is accordingly decided in favour of the assessee."

Thus, from the above, it is clear that the disallowance has been deleted. When the basis of levy of penalty no more exists, the penalty also cannot survive anymore and, therefore, penalty on this issue is directed to be deleted. Ground 2 of the revenue's appeal is dismissed.

4. Ground 3: In this ground, the Revenue has challenged the order of the Ld. CIT(A) in deleting the penalty on the disallowance of processing fee of Rs.4,85,000/-. It has been stated by the Ld. Senior Counsel that though the nature of processing fee involved in this ground is similar and identical to the processing fee covered in ground 2 above which has been held to be allowable by the Tribunal, but inadvertently the Tribunal has not decided this issue under some erroneous impressions that this ground was not pressed before the Tribunal by the assessee. It was further submitted that in any case, no penalty was called for on this disallowance in view of the order of the Tribunal deleting similar disallowance. Further, Ld. CIT(A) has rightly deleted the penalty and no interference is called for in the order of Ld.CIT(A).

5. Per contra, the Ld. DR submitted that the AO had disallowed these expenses for two reasons- it was capital expenditure and in any case, it was prior period expenses, but while deleting the penalty, Ld.CIT(A) had taken into

account only one of the reasons, i.e. it was capital expenditure, and thus his order is not sustainable.

6. We have gone through the order of the Ld. CIT(A) as well as the order of the Tribunal issue on the issue of quantum. It is noted that the Tribunal has examined the facts of the case and nature of these expenses and in the case of similar expenses it was found by the Tribunal that disallowance was unjustified and accordingly disallowance was deleted. It is further noted by us that the assessee has made full disclosure in its P&L Account and return of income. The expense has been disallowed only on the ground that in the opinion of the Assessing Officer, the impugned expenses pertained to prior period and it was capital in nature, whereas the assessee submitted in detail that the expenses got crystallized during the year and, therefore, it pertained to the year under consideration. Further, it was submitted that the expense was revenue in nature as the main business of the assessee company was to assist the other group companies by fulfilling all their needs related to financing etc. The Tribunal has held similar expenses to be Revenue in nature. In any case, the disallowance was made by the Assessing Officer due to difference in opinion of the assessee and the Assessing Officer. In our view, the explanation given by the assessee is plausible explanation. Moreover, the expenses have not been found to be in-genuine or non-bonafide. Ld. CIT(A) has also examined the nature of the disallowance in detail and found that it was not a case of any concealment or furnishing of inaccurate particulars of income. After taking into account all facts and circumstances of this case, we find that the Ld. CIT(A) has rightly deleted the penalty. No interference is called for in the order of the Ld. CIT(A). Thus, ground 3 is dismissed.

7. **Ground 4 :** In this Ground, Revenue has supported levy of the penalty on

the disallowance made by the Assessing Officer on account of excess carry forward of losses. With the assistance of parties, it is noted by us that the Tribunal has deleted the disallowance made by the Assessing Officer vide paras 40 & 41 of its order, which reads as under:-

*“40. **Grounds No. 11 & 12:** The issues raised vide Grounds No.11 & 12 are as to at what stage the deduction under section 10A can be allowed. The assessee deducted the income from its eligible unit u/s section 10A at the first stage i.e. prior to the setting off of the unabsorbed brought forward losses. The AO, however, held that the deduction available u/s 10 A is to be set off against brought forward losses. He accordingly set off the deduction available u/s 10A against the available unabsorbed losses and disallowed the carry forward of business loss of Rs. 6.59 Crores. The Id. CIT (A) upheld the action of the AO in this respect. The assessee thus has come in appeal before us on this issue.*

41. The Ld. A.R. of the assessee, at the outset, has stated that this issue is squarely covered with the decision of Hon’ble Bombay High Court in the case of “CIT vs. Black & Veatch Consulting Pvt. Ltd.” (2012) 348 ITR 72 (Bom) wherein the Hon’ble Bombay High Court has categorically held that the deduction under section 10A has to be given at the stage when the profits and gains of business are computed in the first instance and thus the brought forward unabsorbed losses cannot be set off against current profit of the section 10A eligible unit for computing the income of the assessee. That the unabsorbed losses have to be deducted only from the profit available after allowing deduction u/s 10A. The 54 ITA No.4894” Ld. D.R. has not brought any decision contrary to the above decision of the Hon’ble Bombay High Court. Hence, respectfully following the decision of the Jurisdictional High Court, this issue is accordingly decided in favour of the assessee.”

Thus, from the above, we find that disallowance made by the Assessing Officer has been deleted by the Tribunal. Therefore, there is no basis to continue with the penalty and, thus we find that the penalty on the same has rightly been deleted by Ld. CIT(A). Ground 4 is dismissed.

8. Ground 5 : In this ground, the Revenue has challenged the action of Ld.CIT(A) in deleting the penalty levied by the Assessing Officer on disallowance of claim of Rs 38.84 crores being provision for diminution in value of investment written back for purpose of calculation of book profits u/s 115JB of the Act. During the course of hearing, Ld. Senior Counsel submitted that this claim was made in the year under consideration because in the earlier years disallowance on this issue was made by the Assessing Officer when the provision was made. The claim was made in the year under consideration in the return of income by way of a subsequent note stating that allowability of this claim is dependent upon the outcome of the disallowance made in the earlier year by the Assessing Officer which has been contested in the appeal by the assessee. It was informed that since relief was given in earlier years, therefore, the claim was not pressed in this year. It was contended that since complete disclosure has been made, therefore, it was certainly not a case of concealment or submission of inaccurate particulars of income and claim was made in genuine circumstances in a bonafide manner, therefore, penalty has rightly been deleted by the Ld. CIT(A).

9. Per contra, the Ld. DR relied upon the order of Ld. CIT(A) in the quantum appeal on this issue.

10. We have gone through the facts of this case and orders passed by the lower authorities. It is noted by us with the assistance of the parties that in the return of income, while making this claim on account of provision for investments written back amounting to Rs.38.84 crores, following note has been appended in the computation sheet:-

“Provision for diminution in the value of investments written back has been deducted for the purpose of calculating taxable profits, as the

Assessing Officer in his earlier assessments has added back the provision for investments whilst calculating taxable income u/s 115JB. This addition has been appealed against by the Company and in the event the Appeal is upheld, the current deduction of Rs.38.84 crores will have to be ignored. In such an event, the taxable profit will increase to Rs.26,83,64,896/- and the tax payable thereon will be Rs.2,06,30,550/-."

11. Thus, it transpires from the perusal of the above note that the assessee had conspicuously stated in the return itself while making this claim that this claim was dependent upon the outcome of the appeal of earlier year. Since relief was given in earlier year, this amount became disallowable in the year before us and, therefore, it was held to be rightly disallowed by the AO. But, in our view, it is not a case of concealment of income or furnishing of inaccurate particulars of income. The circumstances was such that if assessee would not have made this claim in the impugned year (though made on conditional basis) and if no relief would have been given in the appeal in earlier years, then, assessee would have lost the benefit in all the years. Therefore, keeping in view the complexities of the provisions of the Act and intricacies arising in the prevailing facts and circumstances, we find that the assessee had made the claim in most transparent and befitting manner. Under these circumstances, it will be harsh and unjustified to fasten the assessee with the liability of penalty. We find that the Ld. CIT(A) has rightly deleted the penalty by observing as under:-

"8.3 The appellant had deducted an amount of Rs. 38.84 crores, while computing the profits as per the provisions of section 115JB. Since this amount was disallowed in earlier years and hence written back as income in the current year, the appellant reduced the same in the computation while computing the profits under section 115JB. However, the AO disallowed the same and added back the said amount to the

income of the appellant. The appellant did not prefer any appeal in regard to this disallowance, because in earlier years, the appellant had succeeded before the higher appellate authorities. It is thus evident that the amount of Rs. 38.84 crores has been correctly disallowed by the AO and confirmed by Ld. CIT(A). However, it will be seen that there is no element of any concealment of particulars of income or furnishing of inaccurate particulars of income. There is, therefore no case for imposition of penalty under section 271(1)(c) of the Act. The AO is directed to delete the penalty levied in this regard.”

11.1. Further, it is noted that nothing wrong could be pointed out by Ld. DR in the well reasoned findings of the Ld.CIT(A), therefore, in view of the discussion made by us in the earlier part of our order and aforesaid order of Ld.CIT(A), we find that the penalty has rightly been deleted by the CIT(A) and no interference is called for in the order of Ld.CIT(A) and, therefore, ground 5 of revenue’s appeal is dismissed.

12. Ground 6: In this ground, the Revenue has challenged the action of Ld. CIT(A) in deleting the penalty levied by the Assessing Officer on account of disallowance of Rs.9 crores being the amount of provision for contingency. It is noted with the assistance of the parties that subsequent to the passing of the assessment order, the Assessing Officer passed an order u/s 154 dt 31-01-2007 wherein the aforesaid addition was deleted. Copy of the order passed u/s 154 has been placed before us and relevant portion of the same reads as under:-

c(ii) The assessee has stated that during the year, Rs.90000000/- was written back on account of provision for contingency resulting in an increase in the Profit Before Taxes; that this amount was erroneously added back u/s 115JB.

It is seen from the records that the out of the total provision of Rs.12,70,00,000/-, the assessee has already reduced Rs.90000000/- in the Profit & Loss Account and debited the net amount thereby

*increasing the Net Profit and the quantifiable Book Profit. The addition of Rs.90000000/- has increased the Profits by the amount not claimed as reduction of the initial stage. Since this is a mistake apparent from the records, the addition of Rs.90000000/- made to increase the Book Profit is rectified and the provision as per para 16 of the assessment order u/s 1433(ii) dated 19/12/2006 is now rectified as **Rs.NIL.**"*

12.1. Thus, it is noted from the above that the addition itself has been deleted and, therefore, there are no basis to continue with the penalty. Under these circumstances, we find that no interference is called for in the order of the Ld. CIT(A) wherein penalty has been deleted. Thus, this ground is dismissed.

13. Ground 7: In this ground, the Revenue has challenged the action of the Ld. CIT(A) in deleting the penalty by the Assessing Officer on account of disallowance of expenditure of Rs.22,14,030/- incurred for issue of debentures / bonds. With the assistance of the parties it is noted by us that this disallowance has been deleted by the Tribunal by observing as under:-

"35. Ground No. 7:

Ground No. 7 relates to the issue of disallowance of expenditure in the shape of upfront fees and brokerage etc. paid for issuing the non-convertible debentures. The AO concluded that since the term of the debentures was spread over two years, hence benefit arrived at by the assessee was of enduring nature spread over two years. The AO therefore calculated the expenses pertaining to the year under consideration and disallowed the remaining expenses.

36. We find that this issue is also covered with the decision of the Hon'ble Supreme Court' in the case of India Cements Ltd. v. CIT [1966] 60 ITR 52, wherein the Supreme Court held that the expenditure in raising loans or issuing debentures would be revenue in nature, irrespective of whether the borrowal is a long term or short term one. It was held that the act of borrowing money was incidental to the carrying on of business, the loan obtained was not an asset or an advantage of enduring nature, the expenditure was made for securing the use of money for a certain period and it was irrelevant to

consider the object with which the loan was obtained. This issue is accordingly decided in favour of the assessee."

13.1. Thus, it is noted from the above that the disallowance itself has been deleted by the Tribunal. Under the circumstances, we do not find any justification to continue with the penalty, and therefore, hold that the same has rightly been deleted by the Ld. CIT(A). Ground 7 is accordingly dismissed.

14. As a result, appeal of the Revenue is dismissed.

Order pronounced in the court on this 28th day of September, 2016.

Sd/-	Sd/-
(C.N. PRASAD)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt: 28th September, 2016

Pk/-

Copy to:

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, J -Bench

(True copy)

By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES