

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI  
BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND  
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

I.T.A. No.1293/M/2014 (Assessment Year: **2007-2008**)

Mahindra & Mahindra Limited, Mahindra Towers, Ground Floor, Worli Road No.13, Worli, Mumbai – 400 018.	बनाम/ Vs.	DCIT, Circle 2(2), Aayakar Bhavan, Mumbai – 400 020.
स्थायी लेखा सं./PAN : AAACM3025E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri M.P. Mahajani
प्रत्यर्थी की ओर से/ Respondent by	:	Shri B. Satyanarayana Raju, DR

सुनवाई की तारीख / Date of Hearing : 06.10.2016

घोषणा की तारीख /Date of Pronouncement : 06.10.2016

**आदेश / O R D E R**

**PER D. KARUNAKARA RAO, AM:**

This appeal filed by the assessee on 26.2.2014 is against the order of the CIT (A)-5, Mumbai dated 12.12.2013 for the assessment year 2007-2008. In this appeal, assessee raised the following grounds which read as under:-

- "1. *On the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in confirming penalty of Rs. 42,08,774/- u/s 271(1)(c) of the Act levied by the AO. The Ld CIT (A) ought to have accepted the contention of the appellant that it had neither furnished inaccurate particulars of its income nor concealed its income and that at the highest, the subject matter of rejection of claim was a case of debatable issue on which two views were reasonably possible.*
2. *The order levying penalty is bad in law and in any event merits being cancelled.*
3. *Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in not adjudicating the ground relating to levy of penalty with reference to tax liability calculated applying tax rate of 35% ignoring the fact that the impugned long capital loss on sale of R & D asset was set off / would be set off against long term capital gains having tax liability @ 20% and not 35%. In any event therefore, the amount of penalty levied by Ld AO be reduced protanto."*

3. At the outset, Ld Counsel for the assessee submitted that in this appeal, assessee is aggrieved against the CIT (A)'s order in connection with the penalty of Rs. 42,08,774/- levied u/s 271(1)(c) of the Act in connection with R & D asset and set off of related loss against the long term capital gains. In this regard, Ld Counsel for the assessee, submitted that an identical issue was adjudicated by the Tribunal in the assessee's own case for the AY 2006-07 vide ITA No.1316/M/2014 (AY 2006-2007), dated 7.4.2016. Para 5 of the said Tribunal's order is relevant in this regard and on the ground of debatability, the Tribunal granted relief and deleted the penalty. In the process, the Tribunal distinguished the judgment of the Hon'ble Gujarat High Court in the case of Dharamshi B. Shah (51 taxmann.com 274) wherein a divergent view was taken in relation to the ratio laid down by the jurisdictional High Court in the case of CIT vs. M/s. Nayan Builders and Developers vide IT Appeal No.415 of 2012, dated 8.7.2014.

4. We have heard both the parties and perused the orders of the Revenue Authorities as well as the cited precedents of the Hon'bel High Courts (supra). On examination of the facts of the present case and the cases cited by the Ld AR, we find, the issue on which penalty was levied is identical to that of the one adjudicated by the Tribunal in the AY 2006-09. Considering the same and for the sake of completeness of this order, the said para 5 of the cited Tribunal's order (supra) dated 7.4.2016 is extracted as under:-

*"5. We have heard both sides and gone through the facts and circumstances of the case. We find that the only issue is disallowance of capital loss, pertaining to receipt arising out of sale of research and development of capital assets, on which the AO has levied penalty and CIT (A) confirmed. On this issue, the Hon'ble Bombay High Court, in quantum, has admitted the substantial question of law as noted above. In view of these facts, we find that the issue is squarely covered by the decision of the jurisdictional High Court in assessee's own case cited supra and also of the Hon'ble Delhi High Court in the case of Liquid Investment and Trading Co supra, wherein it is held that whenever the assessee had preferred appeal in High Court u/s 260A of the Act, which has been admitted and substantial question of law frames, that itself shows that the issue is debatable and for that reason the penalty under section 271(1)(c) of the Act cannot be levied. We are of the view that Hon'ble jurisdictional High Court has clearly laid down the principle that once Hon'ble High Court admits the substantial question of law in quantum appeal of the assessee, that itself shows that the issue is debatable and for that reason penalty u/s 271(1)(c) of the Act cannot be levied. As the issue is squarely covered by jurisdictional High Court and respectfully following the same and Hon'ble Delhi High Court, we delete the penalty and allow the appeal of the assessee."*

5. From the above, it is evident that the Tribunal granted relief to the assessee on finding the issue when admitted by the Hon'ble High Court becomes debatable. When the issue is undisputedly debatable, the penalty is not to be levied in such cases. Accordingly, on this reasoning, we are of the considered opinion that the grounds raised by the assessee are required to be allowed and the penalty should be deleted. We order accordingly. Thus, grounds raised by the assessee are allowed.
6. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 06<sup>th</sup> October, 2016.

**Sd/-**  
**(AMARJIT SINGH)**  
JUDICIAL MEMBER  
मुंबई Mumbai; दिनांक 06.10.2016  
व.नि.स./ OKK, Sr. PS

**Sd/-**  
**(D. KARUNAKARA RAO)**  
ACCOUNTANT MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,  
उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**