आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एच' मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI

सर्व श्री राजेन्द्र, लेखा सदस्य **एवं** श्री संजय गर्ग, न्यायिक सदस्य के समक्ष ।

BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER

आयकर अपील सं./**ITA No.3995/M/2013**

(**निर्धारण वर्ष / Assessment Year: 2009-10)**

M/s. Haven Financial Services Pvt. Ltd., 306/607, Sagar Avenue, Opp. Shoppers Stop, S.V. Road, Andheri West, Mumbai – 400 058 **PAN: AAACH0983Q**	**बनाम/**Vs.	Commissioner of Income Tax (Appeals) – 8, Aayakar Bhavan, M.K. Road, Mumbai – 400 020
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

Assessee by : Shri Ashwin S. Chhag, A.R.
Revenue by : Shri Vijay Kumar Bora, D.R.

सुनवाई की तारीख/Date of Hearing : 09.12.2014
घोषणा की तारीख /Date of Pronouncement : 09.12.2014

आदेश / O R D E R

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the confirmation of penalty levied by the Assessing Officer (hereinafter referred to as the AO) under section 271(1)(c) of the Income Tax Act.

2. The brief facts of the case are that the filed its return declaring an income of Rs.5,62,000/-. Subsequently, the assessee revised its return of income on 4/9/2009 declaring its income at Rs. Nil. The said return was selected for scrutiny and accordingly notice u/s. 143(2) of the Act was issued

to the assessee. During the course of assessment proceedings, the AO observed from the computation sheet filed relating to MAT liability u/s. 115JB of the Act that after determining the net profit as per P & L account at Rs.75,13,273/-, the assessee had claimed a set off of brought forward unabsorbed depreciation of Rs.23,08,941/-. Hence, the AO required the assessee to provide documentary evidence in support of its claim of brought forward unabsorbed depreciation. In response, the assessee filed a computation sheet of total income for AY 2007-08 from where it was observed that the assessee had carried forward unabsorbed depreciation of Rs.6,43,781/- only in that year. Thereafter vide letter dated 15/6/2011, the assessee filed a revised working of MAT determining the MAT liability of Rs.61,47,670/- after claiming set off of total unabsorbed depreciation of Rs.13,43,603/- (Rs.5,93,004/- for FY 2007-08 and Rs.7,50,599/- for AY 2006-07). Along with the said letter, the assessee filed a revised computation of total income for the year under consideration determining the book profit u/s. 115JB at Rs.52,04,332/- which according to the AO was totally wrong. Vide letter dated 10/8/11, the assessee once again submitted a revised working of book profit u/s. 115JB determining the book profit at Rs.62,54,488/- after setting off of total unabsorbed depreciation of Rs.12,36,785/- (Rs.5,93,004/- for FY 2007-08 and Rs.6,43,781/- for FY 2006-07). Along with the said letter, the assessee has also filed copies of return of income as well as computation sheet of total income for AY 2008-09. From the said return, the AO observed that during that year, the assessee had a business income of Rs.54,00,615/- and against which, the assessee had claimed a set off of carry forward business loss of Rs 54,00,615/- and had carried forward the unabsorbed depreciation of earlier years to the tune of Rs.6,43,781/-. Thus, after examining the various contradictory statements, the AO issued a show cause notice on 12/9/2011. In reply to that, the AO submitted that the unabsorbed depreciation is

Rs.6,43,781/- and not Rs.12,36,785/- and the entire depreciation of Rs.5,93,004/- was absorbed in AY 2007-08 and hence there was no carry forward depreciation. In the result total taxable income u/s. 115JB (MAT) would be Rs.68,47,492/- and not Rs.62,54,480/-. The AO assessed the income accordingly. Penalty proceedings u/s. 271(1)(c) of the Act were initiated by the AO asking the assessee to show cause as to why penalty should not be imposed for furnishing inaccurate particulars of income. In response to the above, the assessee filed its submission on 16/2/2012 claiming that the assessee had rightly shown the book profit u/s. 115JB at Rs.52,04,332/- in its return after reducing the brought forward unabsorbed depreciation at Rs.23,08,941/- as per books. However, the AO was not convinced with the above submission of the assessee and held that the assessee liable u/s. 271(1)(c) and imposed penalty of Rs.2,00,000/- for concealing the particulars of its income. Against the said levy of penalty, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)].

3. It was submitted before the Ld. CIT(A) that MAT as per working provided in income tax return and MAT as per actual working u/s. 115JB was exactly matching. While calculating the unabsorbed depreciation for MAT liability, basis taken by the AO was erroneous. The AO took the unabsorbed depreciation submitted with the return of income which was about the unabsorbed depreciation under the normal provisions of the Act whereas MAT calculations u/s. 115JB talks only about the book depreciation and book business loss. Thus, MAT liability arrived by the AO was itself wrong. The assessee further, argued that correct particulars were submitted along with the return of income as well as in the final submission and hence levy of penalty was bad in law. There was no willful concealment and there was no malafide intention on the part of the assessee. The assessee requested that the penalty

levied by the AO should be deleted. The Ld. CIT(A) however did not agree with the contention of the assessee. He observed that the assessee had revised its claim of MAT liability under section 115JB on various occasions and on various times and each time incorrect figures of brought forward unabsorbed depreciation were claimed to set off the same against net profit as per profit and loss account. He observed that the assessee's claim of set off of brought forward unabsorbed depreciation was incorrect in view of the assessed income of the assessee in earlier years. He therefore held that the assessee had furnished inaccurate particulars of income and thereby had concealed its income. He therefore upheld the levy of penalty by the AO at the rate of 200% of the tax sought to be evaded. Aggrieved by the order of the Ld. CIT(A), the assessee has come in appeal before us.

4. We have heard the Ld. representatives of both the parties and have also gone through the records. The Ld. A.R. for the assessee has submitted interalia, that in fact the calculation made by the AO under the normal provisions of the Act was not applicable for the year under consideration as the income of the assessee was assessed under section 115JB of the Act. He has further submitted that the unabsorbed depreciation as per normal provisions of the Income Tax Act had no relevance for arriving at MAT liability under section 115JB as unabsorbed depreciation as per Income Tax Act differs from unabsorbed depreciation as per books of accounts maintained as per Company's Act, 1956. He has stressed that the calculation of unabsorbed depreciation submitted by the assessee along with return of income was correct. In fact, the assessee during the assessment proceedings had changed his consulting Chartered Accountant. The earlier Chartered Accountants M/s. P.P. Mashru & Co. did not cooperate with the assessee in providing the necessary details. The subsequently appointed Chartered Accountants namely M/s. Bharat B. Shah & Co. submitted the details of MAT working during the

course of assessment on the basis of whatever details made available to them. The assessee did not dispute by way of filing any appeal against the book profits determined by the AO at Rs.68,69,692/- because it was only a MAT liability which was akin to advance tax liability adjustable in future assessment years and at the same time there was TDS of Rs.17,46,332/- against increased MAT liability, thus nothing was payable by the assessee even after the additions made by the AO towards MAT liability, rather, still the tax was refundable. He has further submitted that merely because the assessee did not agitate the disallowance/calculations made by the AO during the assessment proceedings that itself cannot be a ground for the levy of penalty.

The Ld. D.R. on the other hand, has relied upon the findings of the lower authorities.

5. We find that the income of the assessee has been assessed for the year under consideration on the basis of MAT provisions under section 115JB. The unabsorbed depreciation while calculating the MAT liability is to be taken as per books of account maintained as per the provisions of the Company's Act, 1956. The unabsorbed depreciation as per the normal provisions of the Income Tax Act is not to be considered while arriving at MAT liability under section 115JB. The assessee has also explained that the AO has calculated the MAT liability taking into consideration the unabsorbed depreciation as per the normal provisions of the Income Tax Act. The assessee had given different calculations since the AO was not satisfied with the claim originally made by the assessee and because of the fact that the concerned Chartered Accountant of the assessee was not cooperating. Even there was nothing payable by the assessee because against the increased MAT liability determined by the AO the assessee had already a claim of TDS of Rs.17,46,332/-. Even after the adjustment of the tax payable under MAT provisions, the refund was due to the assessee. Since the additional tax paid by the assessee under MAT provisions

was akin to the advance tax adjustable in future years, hence the assessee did not choose to contest the increased MAT liability in further appeals. It is a case where the AO has applied wrong provisions to arrive at the MAT liability of the assessee, whereas the assessee had rightly claimed the MAT liability as per the books of accounts maintained by it.

6. Even otherwise, the dispute was in relation to calculation of MAT liability. It was neither a case of furnishing of inaccurate particulars of income nor a case of concealment of income. Hence, the penalty levied on the assessee is not sustainable in the eyes of law and the same is accordingly ordered to be deleted.

7. In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the open court on 09.12.2014.

आदेश की घोषणा खुले न्यायालय में दिनांकः 09.12.2014 को की गई ।

Sd/-	**Sd/-**
(राजेन्द्र / Rajendra)	**(संजय गर्ग / Sanjay Garg)**
लेखा सदस्य / **ACCOUNTANT MEMBER**	न्यायिक सदस्य / **JUDICIAL MEMBER**

मुंबई/Mumbai; दिनांक/Dated 09.12.2014

* Kishore

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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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