<u>आयकर अपीलीय अधिकरण, "ए," खंडपीठ मुंबई</u>

INCOME TAX APPELLATE TRIBUNAL,MUMBAI - 'A' BENCH.

सर्वश्री बी.आर.मित्तल, न्यायिक सदस्य/ एवं श्री राजेन्द्र,लेखा सदस्य

Before S/Sh. B.R. Mittal, Judicial Member & Rajendra, Accountant Member

आयकर अपील सं/.ITA No.8162/Mum/2010,निर्धारण वर्ष/Assessment Year-2002-03

Ajit Balkrishan Estate & Securities P. Ltd., 801 Baktawar, Opp. Colaba, P.O. Colaba Mumbai-400005	Vs	DCIT 3(1), Aayakar Bhavan, M.K.Marg, Mumbai.
PAN: AAACH8584K		

(अपीलार्थी/ Appellant) (प्रत्यर्थी / Respondent)

निर्धारिती ओर से / Appellant by : Shri Jitendra Jain

राजस्व की ओर से/**Revenue by : Shri Surendra Kumar**

सुनवाई की तारीख/ Date of Hearing : 29-10-2013

घोषणा की तारीख / Date of Pronouncement : 08-11-2013

आयकर अधिनियम, 1961की धारा(1)254 के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

<u>PER RAJENDRA, AM:</u>

Challenging the order dated 07.10.2010 of CIT(A)-7,Mumbai,Assessee has filed following grounds of appeal:

> *1.The Commissioner of Income Tax (Appeals)-7 [hereinafter referred to as the CIT (Appeals)] erred in confirming the penalty levied by the Deputy Commissioner of Income Tax3(1), Mumbai ((hereinafter referred to as the DCIT) under section 271(l)(c) relating to the disallowance of the Appellants claim for depreciation of Rs.2,14,744 on house property.*
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> *2.The Appellants submit that they have neither concealed the particulars of income nor furnished inaccurate particulars thereof and merely because the Appellants claim for depreciation on house property has been disallowed would not give rise to the levy of penalty under section 271(1)(c). The Appellants therefore pray that the DCIT be directed to delete the penalty confirmed by the CIT (Appeals).*
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> *3.The Appellants crave leave to, add to, alter or amend the above grounds of appeal or to add a new ground of appeal at any time before hearing of the appeal.*

2.Effective ground of appeal,filed by the assessee-company,deals with confirmation of penalty levied u/s.271(1)(c) of the Act.It had filed its return of income on 31.10.2002 declaring income of Rs. 17.84 lacs.Assessing Officer(AO) finalised the assessment on 28.2.2005,u/s.143(3) of the Act, determining the income of assessee at Rs.61.97lacs.During the assessment proceedings,AO made certain disallowances.Assessee filed an appeal before the First Appellate Authority (FAA), who upheld the following disallowances made by the AO:

i)Income from house property of Rs.1,00,425/-, ii).Depreciation on flat and furniture Rs.2,14,744/-

iii)Disallowance u/s 14A for Rs.4,24,234/-

Meanwhile,AO initiated penalty proceedings u/s 271(1)(c)of the Act and levied a penalty of Rs. 2,63,697/- for concealing particulars of income.While finalising the penalty order, AO held that the assessee-company had made false claims to the tune of Rs.7.39 lacs.

3.Assessee preferred an appeal before the FAA.After considering the submission of the assessee and the penalty order,FAA held that ITAT had deleted the first addition (Rs.1,00,425/-), that issue of disallowance u/s 14A of the Act (4,24,234/-) was set aside by the Tribunal to the file of the AO to re-compute disallowances, that penalty was not leviable for the said two items.

With regard to issue of depreciation on house property amounting to Rs. 2,14,744/-,he held that the assessee had submitted that depreciation was inadvertently claimed,that there was no intention of furnishing inaccurate particulars of income,that in the case under consideration assessee had furnished inaccurate particulars of income and had thus concealed his taxable income. Confirming the order of the AO he upheld the penalty amount related with the addition of Rs. 2.14 lacs and deleted the balance penalty amount.

4.Before us,Authorised Representative(AR) submitted that the assessee had not filed inaccurate particulars of income or concealed particulars of income.He referred to the orders passed by the Mumbai Tribunal for the AY- 2002-03 (ITA No.2598&2863/Mum/2006 dated).Departmental Representative (DR) submitted that depreciation was not allowable on the house property owned by the assessee,that to reduce the tax liability assessee had made an entry of depreciation in its books of accounts, that it was not a debatable issue,that it was case of filing a false claim before the AO.

5.We have heard the rival submissions and perused the material before us.Before proceeding further we would like to discuss some general principles of taxation and the circumstances that justify or prohibit imposition of penalty u/s. 271(1)(c) of the Act.It is a very well known legal proposition that if an assessee claims any deduction or exemption or rebate he has to substantiate his claim by producing positive evidence.Act has provided certain concessions in form of deducti -ons/exemption under the various heads of income and same can be claimed under those heads only.In other words as income of a particular head cannot be assessed under another head, similarly deductions are head specific and cannot be claimed under other heads.Sections 22-27 of the Act deal with income from house property and contain provisions dealing with deductions available under the said head.Depreciation is not the part of above mentioned section. Section 32 of the Act deals with depreciation and it is part of the provisions that deal with income from busin -ess/profession.As per the established principles of taxation jurisprudence,if an assessee is not carrying on business,it cannot claim any depreciation.Therefore,claiming depreciation for an asset that is not used for business or profession goes against the basic structure of the Act itself.

We are of the opinion that there is fundamental difference in a debatable claim and a patently wrong or false claim.There have to be diverse opinions of Hon'ble courts about the claims made under the first category and where assessee can adopt one of the views.In such circumstances,one can say that issue has not reached finality and if assessee has opted for one of the possible views, he should not be visited by penal provisions.But,the claims made under the second category have no legs of their own to stand-they get support of the crutches of falsehood.In other words,legally or factually such claims are not tenable.If a claim put forward by the assessee is not legally valid and results in evasion of taxes,provisions of Sec.271(1)(c)comes in picture.From the language of the section it is apparent that the penal provisions of the said section operate when there is a failure by an assessee to disclose fully or truly all the particulars of his income.The phrase particu -lars of income can be interpreted as facts leading to correct computation of income.So,it can be safely said that whenever any material fact for correct computation is not filed or if filed is inaccu -rate,then penalty has to be imposed. Perusal of the provisions of section 271(1) (c) of the Act indicate that if the FAA or the AO,in the course of any proceeding,is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income,penalty can be imposed.However,under Explanation 1 such penalty can be imposed only if the person fails to offer an explanation or offers an explanation which is found by them to be false or offers an explanation which assessee is not able to substantiate and fails to prove such explanation is bona fide and all the facts relating to the same and material to computation of total income have been disclosed by him.In the case of Kuttookaran Machine Tools (314ITR314)it was found that the assessee had made bogus claims of investment allowance and depreciation in respect of machinery.AO levied penalty u/s.271(1)(c)for furnishing inaccurate particulars.Deciding the appeal against the assessee,Hon'ble High Court Kerala held that though the returns were prepared by the auditor for the assessee,it was for the assessee to ensure that wrong claims were not made by the practitioner or auditor,that imposition of penalty was valid.

Hon'ble Delhi High Court has also dealt the issue of false claim,while deciding the matter of Zoom Communication(327ITR510).In that matter during the penalty proceedings,the assessee claimed that it had committed a bona fide mistake and all the facts material to the computation were disclosed.AO was of the view that there was no difference of opinion as regards disallowa-nce of these expenses and the incorrect computation given by the assessee was an act of paying less tax than what was due from it.FAA upheld the order of the AO.Deciding the appeal field before it,Tribunal accepted the contention of the assessee that due to oversight and bona fide mistake, an error was committed by the assessee but same could not be a basis to levy penalty u/s.271(1)(c) of the Act,especially when all the relevant materials relating to that issue were duly disclosed by the assessee in the course of the assessment proceedings. Accordingly Tribunal deleted the penalty.Deciding the appeal filed by the department,Hon'ble High Court held as under :

> *"So long as the assessee has not concealed any material fact or the factual information given by him has not been found to be incorrect, he will not be liable to imposition of penalty under section 271(1)(c) of the Income-tax Act, 1961,even if the claim made by him is unsustainable in law, provided that he either substantiates the explanation offered by him or the explanation, even if not substantiated,is found to be bona fide. If the explanation is neither substantiated nor shown to be bona fide,Explanation 1 to section 271(1)(c) would come into play and the assessee will be liable for the prescribed penalty.In that matter it was claimed by the assessee that due to oversight certain items were not added back to total income.*
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> *The court cannot overlook the fact that only a small percentage of the income-tax returns are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bona fide, it would be difficult to say that he would still not be liable to penalty under section 271(1)(c) of the Act. If we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be liable to imposition of penalty, even if he was not acting bona fide while making a claim of this nature, that would give a licence to unscrupulous assessees to make wholly untenable and unsustainable claims without there being any basis for making them, in the hope that their return would not be picked up for scrutiny and they would be assessed on the basis of self-assessment under section 143(1) of the Act and even if their case is selected for scrutiny, they can get away merely by paying the tax, which in any case, was payable by them. The consequence would be that the persons who make claims of this nature, actuated by a mala fide intention to evade tax otherwise payable by them would get away without paying the tax legally payable by them, if their cases are not picked up for scrutiny. This would take away the deterrent effect,which these penalty provisions in the Act have.*
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> *We find that the assessee before us did not explain either to the income-tax authorities or to the Income-tax Appellate Tribunal as to in what circumstances and on account of whose mistake, the*

> *amounts claimed as deductions in this case were not added,while computing the income of the assessee-company.We cannot lose sight of the fact that the assessee is a company which must be having professional assistance in computation of its income, and its accounts are compulsorily subjected to audit. In the absence of any details from the assessee, we fail to appreciate how such deductions could have been left out while computing the income of the assessee-company and how it could also have escaped the attention of the auditors of the company."*

In the background of above discussion,we would like to consider the facts of the case before us. We find that while filing the return of income for the year under consideration assessee had shown income of Rs.9.57lacs under the head income from house property,that it had claimed depr -eciation,amounting toRs. 2.14lacs for the said house property,that in the audited accounts also depreciation was claimed.It is not the case of the assessee that claim was made by it by mistake and same was withdrawn during the assessment proceedings.In the case under consideration furni -shing of inaccurate particulars is highlighted not only by absence of legality of the claim,but also by the manner in which audit report and returns of income were prepared and filed.Amount-in-question,depreciation on house property,cannot be claimed by the assessee even on a prima facie basis as the property was not used for business purposes.The facts and circumstances of the case lead to a unmistakable conclusion that the claim had not any iota of good faith on part of the assessee.It has not filed any satisfactory explanation in respect of a patently false claim.We are aware that penalty cannot be levied for debatable claim but in case under consideration claim was not at all allowable. It is not a case of difference of opinion where two views are possible.It also not the case where additions were made on mere technical grounds.It is a case of furnishing of inaccurate particulars as the assessee had claimed deductions of inadmissible items. In the case under consideration assessee had failed to discharge the onus cast upon it therefore,AO and FAA were justified in imposing /confirming penalty.Deciding the effective ground of appeal against the assessee we uphold the order of the FAA.

As a result,appeal filed by the assessee stands dismissed

परिणामतः निर्धारिती द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 08th November,2013.
आदेश की घोषणा खुले न्यायालय में दिनांक **8 नवंबर**, 2013 को की गई ।

Sd/- **Sd/-**

(बी.आर्.मित्तल.B.R.Mittal) **(राजेन्द्र/Rajendra)**

न्यायिक सदस्य /JUDICIAL MEMBER **लेखा सदस्य /ACCOUNTANT MEMBER**

मुंबई/Mumbai,दिनांक/Date: 08th November,2013
SK

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. Assessee /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3. The concerned CIT (A) /संबद्ध अपीलीय आयकर आयुक्त, **4.** The concerned CIT /संबद्ध आयकर आयुक्त

5. DR "A" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि ए खंडपीठ,आ.अ.न्याया.मुंबई

6. Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai**