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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

**INCOME TAX APPEAL NO. 1133 OF 2016**

The Pr. Commissioner of Income Tax ]
(Central), Pune, Swargate, Pune 411 037 ] ...Appellant.

Vs.

Dhariwal Industries Ltd. ]
Manikchand House, Plot No. 100-101 ]
D Kennedy Road, Pune 411 001 ] ...Respondent.

**INCOME TAX APPEAL NO. 1136 OF 2016**

The Pr. Commissioner of Income Tax ]
(Central), Pune, Swargate, Pune 411 037 ] ...Appellant.

Vs.

Dhariwal Industries Ltd. ]
Manikchand House, Plot No. 100-101 ]
D Kennedy Road, Pune 411 001 ] ...Respondent.

**INCOME TAX APPEAL NO. 1129 OF 2016**

The Pr. Commissioner of Income Tax ]
(Central), Pune, Swargate, Pune 411 037 ] ...Appellant.

Vs.

Dhariwal Industries Ltd. ]
Manikchand House, Plot No. 100-101 ]
D Kennedy Road, Pune 411 001 ] ...Respondent.

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Mr Tejveer Singh for the appellant in all appeals.
Mr Nitesh Joshi a/w Mr Atul K. Jasani for the Respondent in all appeals.

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Dhanappa Irappa Koshti
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Date: 2018.09.04 17:14:30 +0530

**CORAM : S. C. DHARMADHIKARI &**
**B.P.COLABAWALLA, JJ.**

**Reserved On : 20th August, 2018**

**Pronounced On: 4th September, 2018**

**JUDGMENT [ PER B. P. COLABAWALLA J. ]:**

1. By these three appeals filed by the Revenue, under the provisions of Section 260A of the Income Tax Act, 1961, the Revenue assails the Judgment and Order of the Income Tax Appellate Tribunal (**"ITAT"**) Pune Bench 'B', Pune dated 12th June, 2015. By the impugned order, the three appeals filed by the Revenue before the ITAT for the Assessment Years ("A.Y.") 2003-04, 2004-05 and 2005-06 were dismissed and the appeal filed by the assessee before the ITAT for the A.Y. 2003-04 was partly allowed. Income Tax Appeal i.e. ITXA No. 1133 of 2016 is with reference to the A.Y. 2003-04, whereas ITXA No. 1136 of 2016 and ITXA No. 1129 of 2016 are with

reference to A.Y. 2004-05 and 2005-06 respectively. Since common questions of fact and law arise in all the three appeals, they are being disposed of by this common order and Judgment.

2. For the sake of convenience, we shall refer to the facts as narrated in Income Tax Appeal No. 1133 of 2016 which is in relation to the A.Y. 2003-04. The assessee (Dhariwal Industries Ltd.) is a company engaged in the business of manufacturing of Pan Masala as well as manufacturing and sale of rawa, atta, maida and salt. Over and above this, they are also involved in sale of mineral water and are also doing business in the area of power generation by wind mills. It is the case of the Revenue that for the A.Y. 2003-04, the assessment was completed under Section 143(3) of the Income Tax Act, 1961 (I.T.Act) on 31st March, 2006. After completion of the assessment, the Assessing Officer (A.O.) also initiated penalty proceedings under Section 271(1)(c) of the I.T.Act and the penalty order was passed by the A.O. on 26th March, 2008 levying penalty of Rs.3,68,00,000/- with respect to the following additions:-

*(1) Dis-allowance u/s 80IA restricted to gross total income computed in order u/s 143(3) ----------- Rs.35,05,981/-*

*(2) Rejection of assessee's claim that sales tax incentive is in nature of capital receipt and therefore not taxable ---- Rs.7,28,71,527/-*

*(3) Addition to the total income on account of items not considered to be eligible for 100 % depreciation------------Rs.2,37,05,481/-*

3. Aggrieved with the aforesaid order of penalty passed by the A.O., the assessee filed an appeal before the Commissioner of Income Tax (Appeals)-I [CIT(A)], Pune. After hearing the parties, CIT(A), by his order dated 20th February, 2009, deleted the penalty with respect to the additions on point numbers 1 and 2 (reproduced above) and confirmed the penalty with respect to the addition mentioned in point No.3.

4. Aggrieved by the aforesaid orders of the CIT(A), both the assessee as well as the Revenue filed the appeals before the Income Tax Appellate Tribunal, Pune ("ITAT"). The ITAT, by the impugned order, confirmed the order of the CIT(A) deleting the penalty levied with respect to the additions as mentioned in point Nos. 1 and 2 (reproduced above). In addition thereto, the ITAT, relying upon the decision of this Court in the case of **CIT** Vs **M/s Nayan Builders and Developers** in **Income Tax Appeal No. 415 of 2012** decided on **8th July, 2014** as well as the decision of ITAT, Pune in the assessee's own case for the A.Y. 1999-2000 and 2000-01 deleted the penalty imposed with respect to the addition in relation to point No.3 (reproduced above). It is aggrieved by this order of the ITAT that all the present appeals have been filed. We must mention here that as

far as A.Y. 2003-04 is concerned, though six questions of law have been raised in the memo of appeal, only one question was re-casted and placed before us by the Revenue and which reads thus:

> "Whether on the facts and circumstances of the case and in law, the Honourable ITAT was correct in holding that since for the earlier year for similar dis-allowance no penalty was levied, hence no penalty can be levied for this year?"

5. As far as, Income Tax Appeal Nos. 1136 of 2016 ( for the A.Y. 2004-05) and Income Tax Appeal No. 1129 of 2016 ( for the A.Y. 2005-06) are concerned, only one question of law was re-casted and placed before us, as a substantial question of law and which reads as under:

> "Whether on the facts and circumstances of the case and in law, the Honourable ITAT was correct in holding that since the appeal in quantum proceedings is admitted by the Honourable High Court, no penalty under Section 271(1)(c) can be levied?"

6. In all these appeals, we find that the appeals with reference to the quantum proceedings have been admitted by this Honourable Court on a substantial question of law. That has also been recorded by the Tribunal in the impugned order and the same is also not disputed before us. We find that the appeals were admitted

as this Court found that there were debatable and arguable questions raised in the quantum proceedings. This being the case, we find that the Tribunal, in the facts and circumstances of the present case, was fully justified in confirming the order of the CIT (A) in all the three assessment years for deleting the penalty as far point Nos. 1 and 2 (reproduced above) are concerned.

7. We are further fortified in taking this view when one considers the findings and observations of the CIT(A) in his order dated 20th February 2009. It is not in dispute that the penalty was imposed under section 27(1)(c) by the Assessing Officer in respect of Point No.1 mentioned above which related to claiming deduction under section 80IA in respect of Gutkha. It is also not in dispute that at the time of claiming the deduction in the return of income, a favourable decision of the Ahmedabad Bench of ITAT in the case of Kothari Products Ltd. V/s ACIT (38 ITD 285) was very much in force which inter alia held that Pan Masala containing tobacco cannot be regarded as a tobacco preparation covered by item No.2 of the 11th Schedule of the Income Tax Act, 1961. It is also on record that the Appeals filed by the Respondent herein against the dis-allowance in respect of this deduction for the Assessment Years 1999-2000 and 2000-2001 by the then CIT (A), relying on the decision of the

Ahmedabad Bench of the ITAT in the case of Kothari Products Ltd. (supra), was allowed. It is true that this order of the CIT(A) for the Assessment Years 1999-2000 and 2000-2001 that were passed in quantum proceedings were set aside by the Tribunal in an Appeal filed by the Revenue. Be that as it may, it is quite clear that the deduction claimed by the Assessee as reflected in Point No.1 as reproduced above (under section 80IA) was on the basis of judicial decisions prevailing at the time of making such a claim and all particulars relating thereto were disclosed in the return of income. Taking all this into account, it can hardly be said that the Assessee has furnished inadequate particulars or had concealed his income within the meaning of section 271(1)(c) of the Income Tax Act, 1961.

8. Similar is the case with reference to Point No.2 reproduced above which relates to the rejection of the Assessee's claim that sales tax incentive is in the nature of a capital receipt and therefore not taxable. This claim was made by the Assessee on the basis of a decision of a Special Bench of ITAT, Mumbai in the case of DCIT v/s Reliance Industries Ltd., reported in 88 ITD 273. Further, in the facts of the present case, in the revised return filed by the Respondent herein for Assessment Year 2003-2004, the facts relating to the receipt of subsidy by way of sales tax exemption /

differal scheme and its treatment by the Respondent, have been clearly mentioned in the computation of income accompanying such return. Taking all these facts into consideration, we find that CIT(A) as well as the Tribunal were not incorrect in deleting the penalty levied on the Respondent herein in relation to Point Nos.1 and 2 reproduced above.

9. In this regard, we would also like to refer to a decision of the Supreme Court in the case of **CIT, Ahmedabad v/s Reliance Petro Products Pvt. Ltd, reported in (2010) 11 SCC 762** wherein it has inter alia been held that an incorrect expenditure claimed in the return was held not to be liable to penalty. The Supreme Court inter alia held that merely because the claimed expenditure was not accepted or was not acceptable to the Revenue, the same would not attract penalty under section 271(1)(c) of the Income Tax Act, 1961. The Supreme Court clearly held that in order to impose penalty, there should be (i) concealment of particulars of income by the Assessee; or (ii) the Assessee must have furnished inaccurate particulars of his income. Submitting an incorrect claim in law would not tantamount to furnishing inaccurate particulars of income or its concealment, was the final finding of the Supreme Court. Paragraphs 17 to 21 of this decision and which are relevant for our purpose read

thus :-

> "**17.** We are not concerned in the present case with mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In *Webster's Dictionary*, the word "inaccurate" has been defined as:
>
> > *"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript."*
>
> We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous.
>
> **18.** We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(*c*) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to inaccurate particulars.
>
> **19.** It was tried to be suggested that Section 14-A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form part of the total income. It was, therefore, reiterated before us that the assessing officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (*i*) an item of receipt may be suppressed fraudulently; (*ii*) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income.
>
> **20.** We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to

accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(*c*). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the assessing officer for any reason, the assessee will invite penalty under Section 271(1)(*c*). That is clearly not the intendment of the legislature.

**21.** In this behalf the observations of this Court made in *Sree Krishna Electricals* v. *State of T.N.* [(2009) 11 SCC 687 : (2009) 23 VST 249] as regards the penalty are apposite. In the aforementioned decision which pertained to the penalty proceedings in the Tamil Nadu General Sales Tax Act, the Court had found that the authorities below had found that there were some incorrect statements made in the return. However, the said transactions were reflected in the accounts of the assessee. This Court, therefore, observed: (SCC p. 688, para 7)

> *"7. So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's accounts books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption penalty cannot be imposed. The penalty levied stands set aside."*

The situation in the present case is still better as no fault has been found with the particulars submitted by the assessee in its return."

10. Even in view of this authoritative pronouncement of the Hon'ble Supreme Court, in the peculiar facts and circumstances of the present case, we do not think that the CIT(A) or the Tribunal was wrong in setting aside the order of the Assessing Officer levying penalty on Point Nos.1 and 2 reproduced above. As mentioned earlier, with reference to these points in the quantum proceedings,

the Appeals have already been admitted in which a substantial question of law is raised. This would clearly indicate that there are debatable and arguable questions raised which would certainly be another factor to be taken into consideration whilst imposing penalty under section 271(1)(c) of the Income Tax Act, 1961.

11. As far as Point No.3 is concerned, the same is with reference to A.Y. 2003 -04. Though the CIT(A) by his order dated 20th February 2009 upheld the levy of penalty on Point No.3, the Tribunal set aside the order of the CIT(A). This was done on the basis that in the preceding Assessment Year, on a similar dis-allowance, no penalty was levied by the Assessing Officer. This being the case and in identical facts, the penalty could not be levied in the succeeding Assessment Year for the very same dis-allowance. To further fortify these findings, the Tribunal relied upon a decision of its Coordinate Bench in the case of **C.P. Mohan v/s DCIT decided on 29th May 2015 in ITA No.957/PM/2011.** Apart from this, the Tribunal also held that as far as the rate of depreciation is concerned, the Assessee has admitted that a genuine mistake was made in adopting 100% depreciation and which mistake was a bonafide one. This explanation was accepted by the Tribunal. In fact, the Tribunal recorded that it was in the impugned Assessment Year that the rate

of depreciation was reduced from 100% to 80%. Considering that it was a bonafide mistake, the Tribunal held that penalty ought not to have been levied even in respect of Point No.3 reproduced above and therefore deleted the penalty levied by the A.O. and confirmed by the CIT(A).

12. Looking to this entire discussion, we do not think that the view taken by the ITAT either suffers from any perversity or an error of law apparent on the face of the record that would give rise to any substantial question of law. We find that the view taken by the Tribunal is a plausible one which does not require any interference by us in our appellate jurisdiction.

13. Before parting we must mention that Mr Tejveer Singh, learned counsel appearing on behalf of the Revenue, relied upon a decision of the Division Bench of this Court in the case of **Principal CIT-2 v/s Shree Gopal Housing and Plantation Corporation, Mumbai in Income Tax Appeal No.701 of 2015 decided on 6th February, 2018** to contend that merely because an appeal has been admitted by this Court in the quantum proceedings, would not automatically mean that the penalty ought to be deleted. Considering the facts that we have discussed above and especially

considering that when the claims as mentioned herein were made by the Assessee, they were governed by judicial decisions of the Tribunal, we do not think that this judgment would apply in the factual matrix before us. From the facts of the present case, it is clear that they were debatable and arguable questions which certainly did not warrant the levy of penalty on the Assessee. This being the case, we find that the reliance placed by Mr Tejveer Singh on the aforesaid decision in the case of M/s Shree Gopal Housing and Plantation Corporation (supra) is wholly misplaced.

14. In view of the foregoing discussion, we find that there is no merit in all the three Appeals and they are accordingly dismissed. However, there shall be no order as to costs.

**( B.P.COLABAWALLA J. )** **( S.C. DHARMADHIKARI J.)**