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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER

ITA No.1681/M/2007
Assessment Year: 1993-94

M/s. Times Guaranty Ltd., Times of India Building, Dr. D.N. Road, Mumbai – 400 001 **PAN: AABCT 2481Q**	Vs.	ACIT, Circle 1(3), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

Assessee by : Shri K. Shivaram, A.R. &
Shri Rahul K. Hakani, A.R.

Revenue by : Shri M. Murali, D.R.

Date of Hearing : 05.08.2014
Date of Pronouncement : 10.10.2014

O R D E R

Per Sanjay Garg, Judicial Member:

The present appeal has been filed by the assessee against the order of the Commissioner of Income Tax (Appeals) [(hereinafter referred to as CIT(A)] dated 05.12.2006 relevant to assessment year 1993-94. The assessee through its grounds of appeal has agitated the confirmation of levy of penalty of Rs.1,44,41,888/- u/s 271(1)(c) of the Income Tax Act (hereinafter referred to as 'the Act').

2. The brief facts of the case are that for the Assessment Year under consideration, the assessee filed return of income declaring loss of Rs.1,15,55,000/-. Thereafter, the assessment was reopened u/s.147 of the Act and an order u/s 143(3) r.w.s. 147 of the Act was passed on

30.03.1999 assessing the income at Rs.4,66,13,960/-. The main issue on which the addition was made by the Assessing Officer (hereinafter referred to as the AO) was with regard to the claim of depreciation on leased assets. The AO after thorough discussion of the matter disallowed the claim of depreciation of Rs.5,78,23,526/-. The AO also initiated penalty proceedings u/s. 271(1)(c) of the Act for furnishing inaccurate particulars of income. Aggrieved by the order of the AO, the assessee went in appeal before the CIT(A).

3. The Ld. CIT(A) disposed off the assessee's appeal vide his order dated 4.9.2000 with the following observations:

> "The first ground of appeal common for both the year under consideration is regarding disallowance of depreciation on assets relating to lease transactions. It was held by the AO that these lease transactions were in the nature of financial transactions and accordingly depreciation was not allowable. The AO further incorporated in the order that out of the disallowance of depreciation, only finance components of lease rentals received in the year should be brought to tax leaving the capital components i.e. principle amount, which would not come within the ambit of income for the year. The appellant subsequently accepted the stand of the department and accordingly, this ground for both the years under consideration is not pressed stands dismissed."

4. In penalty proceedings initiated u/s. 27l(1)(c) of the Act, the assessee made the following submissions:

> "The assessee has filed an appeal to the I.T.A.T. on 23rd November 2000 against the order of the CIT(A), which is pending.
>
> Since the order of the CIT(A) is the subject matter of appeal to the ITAT, the limitation period u/s. 275 of the I.T.Act'61 for completion of the penalty proceedings is extended and does not get time barred by 31 St March, 2001."

5. The ld. AO however found that the contention of the assessee was not tenable. He observed that in the assessment proceedings the AO had made an elaborate finding regarding disallowance of depreciation on leased assets,

treating many of the transactions as not genuine and therefore holding it a case of furnishing of inaccurate particulars of income levied penalty @100% of the amount of tax sought to be evaded. The relevant part of the said penalty order, for the sake of convenience, is reproduced as under:

"7. The relevant observations of the AO in the assessment order at page 18 which is as under : -

"**Western Pacques India Ltd**. :- The assessee company vide lease agreement dated 7.7.92 has entered into a lease agreement with Western Pacques India Ltd., and the assets worth of Rs.50,09,000/- has been leased out to this party. These assets are Bio-gas Pilot Plant on which the assessee company is claiming depreciation @ 100%. This is a sale and lease back transaction. To verify the genuineness of the lease transaction, the Intelligence Wing of the Department at Pune has carried out the survey u/s. 133A of the act on the various sites where the alleged leased assets were installed. Survey is carried out on 2/01/1996 and the Department is completed his enquiry by mid Feb. 1996. The Department has also taken photographs of this assets at the installation site. The findings of the Department of that these assets are either non-existent nor discussed and junk assets having no value. As per the TGFL, the assets were supposed to have been installed by Western pacques India Ltd. at the following places:

(1) **Sankeshwar SSK Ltd. A/P. Sankeshwar, Karnataka.**

The Investigation Team has found that there has been gross violation of the terms of the lease agreement entered into by the assessee company and Western Pacques India Ltd. The survey team in most of the cases did not find the assets to have been installed. Besides where the assets were found from the physical condition of the assets. It is found that the value of the assets has been highly over invoiced and most of the assets are not eligible for 100% depreciation as the nature is more that of an experimental equipment rather than commercial bio-gas plant. Besides it is also found that the "sale and lease back" transaction is a sham transaction. The Department has recorded the statement of the Managing Director, Nandan Gadgil and the statement of the parties where these assets were supposed to have been installed have been recorded"

The AO carried out further enquiries regarding so-called suppliers of the equipments and finally concluded that the assets were never existed and the claim of

the assessee proved to be wrong. Hence, he disallowed depreciation on the non-existing lease assets at Rs.50,00,000/-.

Similarly, the AO has given a finding in the case of Prakash Industries Ltd. the lessee to whom the assessee company allegedly given assets worth Rs.97,58,981/- on lease and claimed 100% depreciation thereon as bogus. At page 22 of the assessment order, the AO brought out further details regarding the investigations conducted in the case of the suppliers of the above equipments and the enquiries and the surveys conducted revealed that the suppliers denied to have manufactured the above equipment. The AO further brought out his findings at page 23 of the order which is as under :-

> "It is noticed that the name and style M/s. A.S. Mechanical Works is being used ingenerating bogus 100% depreciation for its business houses. In the investigations, it was found that there is an existing firm in the name and style of M/s. A.S. Mechanical Works at G.T. Road, Near Gol Chhakkar, Mandi Gobindgarh-147301, which is a partnership firm of Sh. Amarjit Singh and Smt. Mohinder Kaur. The modus operandi of generating 100% depreciation is that the various equipments like air pollution control equipment, flameless furnaces, rough forged rolls for Rolling Mills etc. are the assets which attract 100% depreciation in the year in which they are put to use. A.S. Mechanical Works is shown to have sold these kind of assets to various business house who are desirous of obtaining benefit of 100%. Thus business house in turn lease these assets out to some other concern and in most of the cases it is M/s. Prakash Inds. Ltd. In this process, the method is being used for creating a transaction resulting in claim of 100% in the hands of the business house who alleged to have brought such asset from M/s. A.S. Mechanical Works.
>
> It is also seen that various bogus bills has been generated from M/s. A.S. Mechanical Works. A.S. Forgin, Ashish Engg. Works and in the same, it has been shown that machineries were supplied to M/s. Prakash Inds. Ltd. on behalf of M/s. City Crop Securities & Investments Ltd. It is further more important to mention here that all the three parties have stated that the sale transaction has already been disclosed to CIT, Ludhiana under VDIS-1997 Scheme. The Department has traced the bank account of these parties and the movement of the cheques and drafts issued by M/s. City Crop Securities & Invst. Ltd., and it was found that substantial amount of money which has been deposited in these accounts have been immediately transferred to the account of Prakash Inds. Ltd."

8. Thus the AO gave a categorical finding that the assets were not in existence in the case of assets leased to M/s. Prakash Inds. Ltd. based on an investigation carried out by the Department.

Similarly in the case of M/s. ATV Projects, the AO gave a finding that the assets were not existing. The AO at page 28 of the assessment order stated as under:-

> "In this case the assessee is claiming depreciation on lease assets worth Rs.49,50,000/- @25% amounting to Rs.12,37,500/-. To verify the genuineness of the transaction, summons was issued to the lessee vide summons dated 8.2.1999. In response to the same vide letter dated 6.3.1999 of this party has stated that, it cannot handed over any material or details to the department as all its material have been taken over by the Sales Tax Officer during the survey conducted on them. In this case, M/s. Larson Tourbo was a supplier of lease assets to this party. MIs. Larson Tourbo has also issued a summon on 8.2.1999. In response to the same M/s. Larson Tourbo has filed a letter dated 15.3.1999 in which the have stated categorically that they have not sold any asset to TGFL any time during the relevant F.Y. from 1992-93 to 95-96. Thus, in this case, it will be seen that, there is no supply of the alleged lease assets. Thus in the absence of the supply of the leased assets, the lease transaction cannot be taken as a genuine lease transaction and accordingly, the entire depreciation claimed on the alleged asset to ATB Project are hereby disallowed."

9. Similarly in the case of Mohan Meaking Ltd. the assessee is stated to have leased out boiler to the above party and further investigation revealed that the assessee only part financed the above assets and the supplier of the assets M/s. Cethar Vessels Ltd. confirmed that the assets were sold only to Mohan Meaking Ltd. and to the assessee. Taking into account all the facts, AO treated the above transaction is not a genuine one. Similar finding is given in the case of DCM Shreeram Consolidated for assets worth Rs.1,14,84,000/- (Chlorine Gas Cylinders) which were more than 10 years old taken on sale and lease back. The AO probed the transaction in depth and found that the so-called lessee M/s. DCM Shreeram Ltd. already claimed depreciation on those assets in the past and again depreciation was claimed by the assessee in the capacity of so-called lessor at 100% of the assets valued. In this transaction, the intention of the assessee is very clear to get bogus depreciation to reduce its taxable income by dubious means. The AO further discussed the individual transactions in the case NIT Ltd., Hint Pack Ltd. & Patodia Syntex Ltd. etc. and concluded that the above transactions are not genuine lease transactions.

10. Apart from the above, the AO at page 30 of the assessment order discussed at length in cases where the summons were returned unserved by the postal authorities by listing out names of 7 parties. The AO also made a discussion about the parties to whom summons were issued but no replies were received from them. Such parties were listed out by the AO at 6 numbers. The AO has given ample opportunity to the assessee to prove the genuineness of its claim but unfortunately the assessee did not discharge its primary onus of proving its case. In the absence of proper evidence forthcoming from the assessee, the AO concluded that transactions were not genuine. After taking strength from various case laws, the AO finally concluded that the lease transactions were not genuine and at best they can be treated as finance transactions and accordingly, disallowed depreciation claimed by the assessee. Since the depreciation was disallowed, the capital component included in the lease rentals was reduced and finally the net disallowance on account of depreciation was arrived at Rs.2,79,07,031/-. The assessee has not controverted the findings of the AO neither before him nor before the CIT(A).

11. Regarding the A.R.'s request to keep the proceedings pending till disposal of the appeal by the ITAT is not tenable. Perusal of Form -36 filed by the assessee before ITAT shows that the assessee has taken only one ground on account of disallowance of depreciation on assets given on lease prior to A.Y. 93-94. This relief was already granted by the Ld. CIT(A)XXXIII, Mumbai vide his order dated 4.9.2000 at para 5 of his order and accordingly the assessee was granted relief to that extent by passing order u/s. 250 of the Act. Hence, the ground taken before the ITAT in this regard does not survive. Moreover, it is the discretion of the Department to keep the matters pending or not till the disposal of the appeal before the ITAT depending upon the facts of each case. In this case, the assessee filed a loss return of Rs.1,15,55,000/- and the same was finally assessed at an income of Rs.1,66,91,410/- as per order u/s.250 dated 2nd March 2001. It has been judicially held that penalty is leviable even in the case where loss has been reduced. Reliance placed on the decision of the Hon'ble Karnataka High Court in the case of P.R. Basavappa and Sons Vs. CIT (243 ITR 776). Similarly, the Kerala High Court also given a finding in the case of CIT Vs. India Sea Foods (105 ITR 708) wherein it was held that levy of penalty is justified even in the case of assessed loss.

12. In view of the above facts and legal position, I am satisfied that the assessee has willfully concealed the particulars of income by making bogus claim of depreciation on leased assets which are contrary to the facts and legal position. Hence, the income sought to be evaded is worked out as mentioned above is Rs.2,79,07,031/- and the tax thereon is Rs.1,44,41,888/-. Hence, the minimum penalty

being 100% of the tax sought to be evaded is hereby levied u/s. 271(1)(c) of the Act at Rs.1,44,41,888/-.

13. Issue demand notice and challan accordingly."

6. Being aggrieved by the above levy of penalty by the AO, the assessee preferred appeal before the CIT(A).

6.1 It was contended by the assessee before the CIT(A) that there were certain factual discrepancies in the assessment order as well as in the penalty order u/s.271(1)(c). It was stated that the equipment that was mentioned as leased to certain companies such as M/s. Western Pacque India Ltd., M/s. Prakash Indus. Ltd. etc. had not actually been leased out to those companies. The equipment that was leased to such companies was in fact different from that mentioned in the assessment order. The ld. CIT(A) called a remand report from the AO in regard to this aspect of the matter. The AO in his report dated 21.11.2006 mentioned as under:

"In view of the above, the folder for A. Y. 1993-94 is verified and it is found that no such details are available in the said folder to confirm whether, the mistakes pointed out by the assessee are true. In the absence of relevant details, it is not possible to verify whether the facts contended by the assessee are correct or not? Though, in the order u/s.143(3), the A.O. has stated that various enquiries were carried out with the lessee as well as supplier of the plant & machinery, which are leased out, by issuing summons along with detailed questionnaire to these parties, the details of the same are not in the said folder containing the assessment order. On going through the assessment order, it is seen that there could be or there could not be another folder, containing the relevant details from which, the facts stated by the assessee can be verified".

7. The ld. CIT(A) after considering the submissions of the assessee and going through the report of the AO observed as under:

"22. I have gone though the submissions made by the appellant vide letter dt.11.01.2003 wherein objection has been raised saying that there are discrepancies in respect of leased out assets considered in the assessment order and also saying that

the assets involved are different than those mentioned in the assessment order and subsequently in the penalty order.

23. The appellant has furnished details in respect of M/s. Western Pacque India Ltd., M/s. Prakash Industries Ltd., ATV Projects Ltd., Mohan Meakins Ltd., DCM Sriram Consolidated Ltd., NIIT Ltd., Gilt Pack Ltd. and M/s. Padodia Syntex.

23. In the said submissions and statement furnished vide letter dt.11.01.2003, the appellant through ld. A.R. has reiterated the replies and explanations furnished before the A.O. during the course of assessment proceedings. One such example is given below, where the appellant has brought on record the reply furnished before the A.O. vide his letter dt. 29.03.1999 in the following manner:-

> "Also in respect of Western Paques Ltd. where search and seizure operations are stated to have been conducted, we wish to state that we have sold the asset to them in January, 1996. (January, 1996 is a typographical mistake. It is July, 1995). We have no idea of the date on which the search and seizure operation was carried out. We would like to submit we do not have any idea of the existence of the asset after the sale by us to them. [effluent treatment]."

24. Similarly, the appellant has pointed out the alleged discrepancy in the case of M/s. Prakash Industries Ltd. by saying that the equipment leased to them was Rolling Mill Rolls whereas the Officer says that asset leased is Air Pollution Control equipment.

25. In the case of ATV Projects Ltd., it has been stated that "There is no lease transaction with ATV Projects in the previous year relevant to 1993-94 assessment. In the previous year ended 31st March1 1993, there is one leasing transaction with Shetron Ltd. The copy of the letter dated 29th March, 1999 submitted to the Assessing Officer copy enclosed as Annexure 8) in respect of leasing transactions of 1993-94 assessment, contains 4 lists as annexures and one of the annexures give the names of 11 leasing transactions where "the leased assets have been sold to the lessee".

26. In the case of M/s. Mohan Meakins Ltd., it has been stated and submitted that "It is established from what the Officer has stated in the at order that the assessee had paid for the Natural Gas Fire Boiler to the supplier of the boiler Rs.37,60,911. The payments were made by 4 D/Ds in favour of the supplier, Cethar Vessels Ltd. The 4 D/Ds dated 17th September, 1992 (3 each for Rs.9.90 lacs and the 4th one for Rs.7,90,911). The aggregate of the 4 payments is Rs.37,60,911. (copies enclosed as Annexure 18). The invoice from Cethar Vessels (supplier) on Times Guaranty dated 4th

September, 1992 for Rs.41,78,790/- is enclosed as Annexure 17. This establishes clearly that the assessee purchased the Natural Gas Fire Boiler from the supplier".

27. In the case of DCM Sriram Consolidated Ltd., it has been submitted that "The party's letter dated 16th March, 1999 has been used by the Officer without giving an opportunity to the assessee to meet the same. We do not know what the party has written in that letter. It is accepted by the Officer that 261 chlorine gas cylinders are the assets involved in the lease and it is a sale and lease back transaction and that it is sold for Rs.1,14,84,000 per invoice dated 19th September, 1992. The Officer accepts that the sale is as per invoice dated 19th September, 1992. A copy of the same is enclosed as Annexure 21. It can be noticed that cylinder numbers for 261 cylinders are mentioned in the invoice.
The Officer draws an inference that just because the cylinders are old, the entire depreciation on these cylinders must have already been availed of by DCM Sriram. We do not know whether the party stated so in its reply dated 16th Mach, 1999.

28. Similarly, in the case of the remaining other parties, the appellant has submitted the statements and replies which relate to the points in the assessment order or which were alternatively considered during the course of assessment proceedings.

29. In light of the above facts and circumstances of the case, it is seen that the subsequent submission made by the appellant saying that there is factual discrepancy in the assets discussed in the assessment order/penalty order is an issue beyond the purview of this appeal. It is seen that in the grounds of appeal nowhere such ground has been taken that there is factual discrepancy in respect of leased out assets, which have been elaborately discussed in the assessment order and subsequently in the penalty order. On the other hand, it is also seen from records that the said assessment order was a subject matter of appeal and same was decided vide order dt. 4.10.2000 by the CIT(A)XXXIII, Mumbai, where no such discrepancy was taken as a ground in appeal neither at any appeal stage of the said assessment order. The penalty order was passed on 30.03.2001 I and assessment order was passed on 30.03.1999. The appeal against the penalty order was filed on 26.04.2001. Thereafter, the hearing of the appeal has been fixed from time to time and it is evident from the record that the issue of factual discrepancy has been for the first time, raised by the appellant vide his submissions dt.11.01.2003. I would consider these submissions as out of place and a belated reaction on the part of the appellant because if at all there was a factual discrepancy in the assessment order in respect of leased out assets, same could have been, should have been brought on record during assessment

proceedings and agitated in the appellate proceedings of the assessment order in question.

30. A further reading of the statements/submissions made vide said letter dt.11.01.2003 shows that these are based on the explanations/replies filed before the A.O. during the course of assessment proceedings. Same have been duly considered and discussed in the assessment order, and any way, it attained a finality as the appellant has not got such relief in the appeal orders. Therefore, by bringing in the issues of the assessment proceedings before the A.O. for reconsideration in the appellate authority proceedings of the penalty order, is out of the purview and not permissible under law. It has no bearing on the penalty proceedings and pursuant appellate proceedings of penalty order u/s. 271(1)(c) before me as the penalty and assessment proceedings are distinct and separate.

31. In light of the above observations and facts of the case, I find that submissions made by the ld. A.R. vide letter dt.11.01.2003 saying that there is factual discrepancy in the assessment order and subsequently in the penalty order cannot be entertained, because if there was any such discrepancy, same could have been agitated in the appeal against the assessment order, which has not been done in this case. The appellate proceedings against the order u/s. 271(1)(c) cannot be used as a window to re-examine/reopen the factual finding of the assessment order, which has already attained a finality as such by virtue of appellate proceedings on the said order. Considering this position, I find that the argument of the appellant for reconsidering the alleged factual discrepancy of the assessment order in the appellate proceedings of the penalty order u/s.271(1)(c) is misplaced, unjustified and not permissible under law.

32. It is also pertinent to note that this issue of factual discrepancy is not taken in the grounds of appeal of the penalty order u/s. 271(1)(c). It is only through the letter dt. 11.012003 that such an argument has been placed possibly as an afterthought, which in any case is irrelevant to the issues involved in the context of penalty order u/s. 271(1)(c).

33. The assessment proceedings and penalty proceedings are wholly distinct and independent of each other. It is only the facts and details of the transaction and conduct of the business affairs as reflected in the account books/final accounts of the assessee, which are considered as evidence/ material for the purpose of determining the liability of the assessee with reference to section 271(1)(c). Once certain facts and business affairs and / or final accounts of the assessee are examined and definite fact findings are reached, based on which additions are made,

the same cannot be reconsidered or reopened for different interpretation for the purpose of 271(1)(c) proceedings. The definite and separate nature of both the proceedings viz., assessment proceedings and penalty proceedings has a definite bearing to the facts and arguments of this case where the issues and facts already decided and having attained the finality, are pressed to be reconsidered in the submissions made by letter dt.11.01.2003. Considering the distinctive nature and separate proceedings, those issues cannot be reconsidered, which should not be reconsidered. Hence, the submissions made by the id. A.R. vide said letter where ground of factual discrepancy has been agitated, is dismissed as being misplaced and irrelevant in so far as appellate proceedings u/s.271(1)(c) are concerned.

34. The penalty order passed by the A.O. u/s.271(1)(c) is based on the facts and material gathered, examined and decided after considering the explanations and submissions of the appellant before the A.O. and also during the appellate proceedings against the order of the assessment. There is no alteration or modification in the facts of the case in respect of leasing out of the assets as held by the A.O. to be actually sham transaction which were actually a finance transaction. Same has been discussed in elaborate detail in the assessment order and part of which has been reproduced in the foregoing paragraphs. It is also seen that the objections raised by the appellant on the point of 'discrepancy of facts' are basically the same, which have been raised by the appellant before the A.O. during the assessment proceedings. The same have been considered and discussed in the assessment order and found to be unsubstantiated/wrong. A few other reasons argued on this issue of factual discrepancy saying that, the said assets were not leased, that such assets were already sold and so on, are the arguments, which are contrary to the facts of the alleged leasing transaction based on which the appellant had claimed the depreciation. In any case, it is the wrong claim of depreciation of the appellant made in the original return of income/revised return of income, which is the subject matter of penalty. The various arguments forwarded by the appellant through letter dt.11.01.2003 merely point out that some assets may have been sold out or that some assets may not have been actually leased, but at the same time these arguments do not support the wrong claim of depreciation made by the appellant, which was disallowed by the A.O. Vide the original assessment order, whether the assets were sold or such assets were not leased or for any other reason, the claim of depreciation of the appellant remained unsubstantiated as per the assessment order u/s.143(3)/147. Therefore, merely pointing out discrepancies without establishing the claim that the depreciation claimed by the appellant was correct and same could have been allowed, does not change the facts of the case. The fact remains that the assessee had claimed depreciation and same were reflected in the books of account and final accounts of the assessee as a bonafide and genuine claim,

which were found to be invalid, ungenuine and false and that is why a disallowance of Rs.5,78,23,526/- was made vide assessment order dt.30.3.1999 and subsequent rectification order u/s.154 dt.18.8.1999 through which relief has been allowed on account of capital portion of lease rentals. The A.O. has categorically noted that assessee company would not be entitled to any depreciation u/s.32 on the actual cost of assets which were not really owned by it but were held merely for the purpose of security of the loans given to various borrowers in the garb of lesser transactions, entered into during the P. Y. under consideration [whether by way of new asset lease or sale of old asset and lease back transactions]. Thus accordingly the claim of depreciation of Rs.5,78,23,526/- on the alleged lease assets are hereby disallowed. On this issue penalty proceedings u/s.271(1)(c) of I.T. Act is hereby intimated on the claim of the entire lease depreciation of Rs.5,78,23,526/-.

35. The other argument forwarded by the ld. A.R. is that there is no mens rea involved in the claim of depreciation in assessment proceedings. The facts of the case show that depreciation was claimed on assets which were shown to be leased out, but contrarily were only finance by the assessee and held as security to the said finance on paper/ agreement. In some of the case, as discussed above, the suppliers have denied that such assets were supplied by them to the lessee. In the case of Prakash Indus. Ltd., M/s. Sahib Engg. Works, G.T. Road, Mandi Gobindgarh was the supplier and enquiries revealed that they had not supplied air pollution equipment to M/s. Prakash Industries Ltd., rather no such air pollution control equipment was manufactured by the said party. In fact, on enquiries by DIT, Bhopal at the business premises of Prakash Inds. Ltd., it was found that such equipment did not exist at the given place belonging to Prakash Inds. Ltd. The details of such transaction which were relied upon by the appellant for the purpose of claiming depreciation were elaborately enquired and found false and not as per the facts and details furnished in the Return of Income and shown by the appellant for the purpose of charging depreciation. In the case of ATV Projects, the supplier of the assets L&T has denied the sale of such equipment to the appellant. The totality of facts and circumstances emerging from the details as noted in the assessment order in detail and also as noted in the penalty order u/s.27 l(l)(c) show that it is not a case of difference of opinion or different interpretation of a legal provision or bonafide claim. The disallowance has been made on the specific fact finding that leased assets were not in existence or that the transaction of leasing as shown by the appellant for the purpose of claiming depreciation was not leasing transaction, contrarily it was a finance transaction. There cannot be two divergent facts on the same thing. The factual misrepresentation on the existence of assets and also on the nature of transaction, as pointed out in the assessment order, which has stood the test of appeal, go on to show that there was misrepresentation of the facts and transactions both in the books of account of the assessee which could be possibly

only with full intention and conscious preparation of books of account/final accounts contrary to the factual position. This proves the mens rea that is the conscious and deliberate action on the part of the appellant to hide, to cover, to prevent the discovery of facts as they are. The facts of the case show that same are not covered within the umbrella of bonafide belief. Further, the case of the appellant shows that the deduction/ depreciation claimed by the appellant based on certain facts have been disproved and only then the claim of depreciation has been disallowed. That is to say, the disallowance is not based on such set of facts "which are not proved". The state of affairs reveal that the facts based on which depreciation was claimed stand "disproved", hence it is not the case of mere rejection of explanation offered by the assessee which could take it out from ambit of penalty proceedings. Whether there is concealment or not is, ordinarily, a question of fact **[Sir Sgadilal Sugar & General Mills Ltd. vs. CIT (1987) 168 ITR 705 [SC]** and same has been recorded in detail in the assessment order and also in the penalty order.

36. It is seen that that the A.O. has recorded the reasons and satisfaction for invoking the penalty proceedings u/s.271(l)(c) on page 43 of the assessment order and the same also has been discussed in the penalty order u/s.27 l(l)(c) where the A.O. has held that "the assessee has willfully concealed the particulars of income by making bogus claim of depreciation on leased assets which are contrary to the facts and legal position."

37. It emerges from the facts and circumstances of the case that bogus transactions have been recorded in order to display income at a much lower figure **[Cement Distributors Pr. Ltd. Vs. CIT (1996) 60 ITR 586 (Mad)]** and also claiming a false or fraudulent deduction **[Nagin Chand Shiv Sahal vs. CIT 6 ITR 534 (Lah)]** and both of these situations are covered within the meaning of deliberately furnishing inaccurate particulars of income"

38. In view of these facts and legal positions, I find that the penalty levied by the A.O. is justified. Hence, grounds no. 1 to 3 of appeal saying that a) the penalty is not warranted in law, b) that penalty is not correct in law and c) provisions of Section 271(1)(c) are not attracted is dismissed because as discussed above, the facts and circumstances of the case show that a) penalty under reference is warranted in law, b) levy of penalty is correct in law and c) same is attracted as per the provisions of law.

39. **Ground no. 4 of appeal** is that the penalty levied is more 100% of the tax on total income and it is in excess and same may be cancelled.

After considering the facts and circumstances of the case, I find that the penalty levied by the A.O. is within the given percentage of levy of penalty as per the law, hence no interference is called for. **As a result this ground is dismissed**.

40. **Ground no.5 of appeal** is that when the income returned is a loss, the provisions of Section 271 (1) (c) are not attracted.

41. This ground of appeal is contrary to the legal position and settled law. Tax on income sought to be evaded is clearly defined in the Income tax Act and as per the same, the appellant fails on this ground, which is contrary to the legal position and facts of the case. The explanation clauses of section 271(1)(c) are integral part of the section, hence this ground of appeal is dismissed as per section 271(1)(c) read with explanations to the said section.

42. Thus, in the result, the appeal is dismissed. The penalty of Rs.1,44,41,888/- levied on the appellant u/s.271(1)(c) vide order dated 30.03.2001 is confirmed."

8. Aggrieved from the order of the ld. CIT(A), the assessee has preferred the present appeal before us.

9. We have heard the rival contentions of the ld. representatives of both the parties and have also gone through the records. The first contention of the ld. counsel for the assessee has been that the transactions in question were not bogus. Further that the question as to whether the transaction in question is that of operating lease or financial lease is a highly debatable issue, hence the imposition of penalty on a debatable issue was not justified. He has further contended that there were factual discrepancies in the order of the AO. The assessee did not agitate about the said discrepancies as the assessee did not press the ground because it did not have any tax impact. However, when the factual discrepancies were pointed out during the appellate proceedings in appeal against the penalty order before the ld. CIT(A), a remand report was called by the ld. CIT(A) from the AO. However, the AO did not submit its opinion about the factual discrepancies so brought by the assessee. He has further contended that since some of the equipments were procured by lessees

directly, assessee could not be said to be aware of the fact that the transactions were bogus. He has further relied upon various decisions of the Tribunal as well as higher authorities to submit that where the issue is debatable and merely because the claim of the assessee has not been accepted, that itself cannot be a ground for imposition of penalty. He has further submitted that the assessee neither had concealed nor filed any inaccurate particulars of income. All the details were duly furnished along with return. The assessee did not contest the matter before the ld. CIT(A) in appeal against the assessment order to avoid litigation and also since the AO had allowed the capital portion of lease rental to the assessee, hence there was not much tax effect. Even there was no loss to the Revenue in this case. Hence, the levy of penalty, otherwise was not justified.

On the other hand, the ld. D.R. has relied upon the findings of the lower authorities.

10. We have considered the rival submissions. A perusal of the record reveals that during the search/survey operation on M/s. Western Pacques India Ltd., which was one of the major lessees having the transaction of lease with the assessee, it was found that the alleged leased assets were neither installed nor put to use by the lessee and were in fact non existent. Even, the most of the assets stated in the lease agreement were not eligible for 100% depreciation. It was also found that there were huge over invoicing of the said assets. Even lot of old and discarded junk assets had been introduced in the lease transactions in the garb of sale and lease agreement.

10.1 The AO in the assessment order has discussed in detail the lease transactions, one by one, entered by the assessee with various lessees. A categorical finding has been given by the AO that the transactions in question were in reality loan transactions which were given the colour of lease

transactions, only to avail the tax benefit of depreciation under the Income Tax Act. Even it was also agreed by the assessee with the lessees that a part of such benefit would be passed on to the borrower in the form of interest on the loan amount taken, which was agreed to be recalled in case the assessee company would not get the expected tax benefits from the Income Tax Authorities. The AO has observed that it was a case of trading in tax benefits. Even the AO in the assessment order has categorically observed that it was not only the case of transfer of tax benefits from the borrower to the assessee company, rather was a case of claim of identical benefits by the assessee company when the borrower was also in fact claiming such benefits. The borrower in this case was also claiming deduction of depreciation on the cost of new asset (though capital component of the lease rental) over the lease period at the rate of depreciation of asset at the rate of 25% whereas the lessee was availing the claim of depreciation on an accelerated rate in most of the cases. The AO had called upon the necessary explanations from the assessee on the subject matter and after duly considering the reply/explanations given by the assessee, he concluded that most of the transactions were bogus and the other were sham transactions. Explanations were not only called from the assessee but from the lessees also.

10.2 Even the assessee itself, in the statement of facts submitted before the ld. CIT(A), has mentioned that in some cases the party (lessee) had taken the assessee for a ride by cheating the assessee with regard to the purchase of assets. The assessee had come to know about this fact only from the assessment order. This explanation given by the assessee itself proves that the assessee neither purchased/owned the alleged leased assets nor was aware as to whether the said assets were ever purchased by the alleged lessees. Had the assessee leased the assets in question, the assessee firstly would have

purchased those assets either from the manufacturer in case of simple lease transactions and/or from the lessee itself in case of "sale and lease back transaction". When the assessee itself was not aware about the existence of assets, it was obvious that such a transaction could not fall in the definition of lease transactions. Thorough investigations were carried out by the AO including explanations called from the respective parties and even the suppliers of the equipments and in most of the cases it was found that either the alleged assets did not exist or the assets were different from that mentioned in the assessment order or the junk assets having no value were shown as the leased assets. The transactions in most of the cases were bogus in nature and in some cases bogus bills were generated. Even the department had traced the bank account of certain parties and the movement of cheques and drafts issued by the supplier and it was found that substantial amount of money deposited in these accounts of the suppliers of machinery had been immediately transferred in the accounts of lessee e.g. in the case of 'Prakash Industries Ltd.' In some of the cases, the so called lessee had already claimed depreciation on the assets on the old assets and the assessee again claimed depreciation at the rate of 100% on such assets in the garb of sale and lease back agreements.

10.3 After detailed investigations, AO had concluded that the transactions were bogus, sham and colourable devise to evade the tax. The transactions in question at the most could be said to be loan transactions and nothing more than that. We may further note that in appeal against the assessment order, the assessee agreed to the additions made by the AO and did not contest the findings of the AO regarding the transactions being bogus and sham in nature. The assessee, though, before us has taken a plea that there were factual discrepancies in the assessment order, but such a plea was neither taken by the

assessee during the appellate proceedings against the assessment order nor in its appeal before the ITAT in the said quantum proceedings, even not during the penalty proceedings before the AO. Such a plea was taken for the first time before the ld. CIT(A) in penalty appeal only. The ld. counsel for the assessee has submitted before us that such a plea was taken before the ld. CIT(A) in quantum proceedings, but since the claim of the assessee regarding capital component was accepted, hence the assessee did not contest or agitate its point. However, we have gone through the grounds of appeal of the assessee put before the ld. CIT(A) during the appellate proceedings against the assessment order and found that no such a plea of factual discrepancies in the order of the AO was taken by the assessee. However, a perusal of the statement of facts put before the ld. CIT(A) in relation to said appeal reveals that the assessee had mentioned that the AO in the assessment order had mixed up the facts which would be explained at the time of hearing. The above statement of facts shows that the assessee had not agitated about the factual findings or about any major discrepancy going to be root of the case rather it was stated that the AO has mixed up certain facts. The findings arrived at by the AO after making the detailed and elaborated investigation, inquiries and due consideration of the matter were not in fact denied by the assessee. Even, the assessee in the said appellate proceedings agreed that the transactions were loan transactions and did not contest the issue. No such plea about any defect in the findings arrived at by the AO was agitated by the assessee during the penalty proceedings also. It was only for the first time that such a plea had been taken in appellate proceedings against the penalty order. Though the ld. counsel for the assessee has relied upon various case laws to stress the point that the penalty proceedings are different from the assessment proceedings and the assessee can lead further evidence to show that the penalty could not be attracted in its case, however, it is also a settled law that the evidences taken

into consideration during the assessment proceedings, though not conclusive, but have good evidentiary value. By merely pointing some discrepancies in the order of the AO that too at a belated stage during the appellate proceedings against the penalty order, which even could not be verified by the AO due to lapse of sufficient time and non traceability of the concerned folder, itself, is not sufficient to prove that the findings arrived at by the AO that the transactions in question were sham, bogus and colourable devise were not correct. The detailed findings of the AO, the assessee not agitating the findings of the AO in quantum proceedings, no plea of factual discrepancies during quantum proceedings and appeals, even no such plea before AO during penalty proceedings and no rebuttal to the findings of the AO that the transactions were bogus and sham are sufficient facts to hole that the assessee had put a false claim of depreciation during the assessment proceedings. The plea of the assessee that he did not contest the addition to avoid litigation or to buy peace etc. even does not seem plausible. The assessee during the year had claimed depreciation of huge amount of Rs.5,17,09,213/- which was not fund genuine by the AO. The Hon'ble Supreme Court, in the case of "MAK Data P. Ltd. vs. Commissioner of Income Tax-II" civil appeal No.9772 of 2013 date of decision 30.10.13, has categorically held that it is the statutory duty of the assessee to record all its transactions correctly and to clear its true income in the return of income. The AO should not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed

by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise. In the case in hand, the assessee has failed to discharge its burden that it has not put a false claim of depreciation and the plea that the finding was not agitated to buy peace or to avoid litigation also does not seem to be justified. The other plea taken by the assessee is that in fact there was no tax effect when the income shown by the assessee in subsequent years is taken into consideration. The assessee on this aspect of the matter has relied upon a chart at page 322 of the paper book. We may find that such a plea of the assessee is also not convincing. The assessee in the assessment year in question has claimed a huge claim of depreciation. Merely because in the subsequent years, the net tax effect would be 'zero' or otherwise, does not lessen the burden of the assessee to state true and correct particulars of the income for the year under consideration. In the year under consideration, the assessee had made a false claim of depreciation, is the relevant fact, which we note from the record that the same was correctly noted by the AO.

11. So far, the contention of the ld. counsel for the assessee that whether a transaction is a lease transaction or a finance transaction is a debatable legal issue, we are not inclined to accept this argument also. Whether a transaction is a lease transaction or a loan transaction, in our view, is a factual issue which is to be decided after appreciation of the relevant facts. If the facts show that the assessee has put a wrong claim of depreciation by showing a finance or loan transaction as a lease transaction, certainly the claim is to be disallowed. However, in cases, where from the facts and evidences on the file it can be shown that the transaction was real or genuine, the relief of claim of depreciation is to be allowed. In the case in hand, from the facts, it was clearly established that the assessee had put a wrongful claim of depreciation and

thereby had furnished inaccurate particulars of income for the purpose of concealment of real income, hence, the penalty proceedings were correctly initiated by the AO. It was not a case of tax planning by the assessee so as to avoid or reduce its taxes by remaining within the framework of the law. The transactions entered into by the assessee were sham and bogus transactions which were intended to defeat the provisions of law. It may be observed that tax avoidance by way of tax planning or structuring the transactions so as to reap the largest tax benefit may be permissible under law but fraudulent transfer of assets or income or engaging in sham transactions with the object of reducing the tax liability cannot be said to be a case of tax avoidance but of tax evasion. Any act or attempt to reduce the tax liability by deceit, subterfuge or concealment is not permissible under law.

12. In our view, it was a clear cut case of furnishing of inaccurate particulars of income and as such the penalty has been correctly levied by the lower authorities in this case. So far the reliance of the ld. counsel for the assessee on catena of judgments such as "CIT vs. Development Credit Bank Ltd." ITA No.5409/M/10 dated 06.09.11 and other decisions as mentioned in the paper book, it can be observed that in all such decisions a categorical finding has been given that the assessee had given a bonafide explanation which was accepted by the concerned judicial authorities. However, in the case in hand, we find neither the assessee offered any explanation nor the assessee could show us that the claim of the assessee regarding the depreciation was bonafide. The various case laws relied upon by the assessee are quite distinguishable when compared to the facts of the case in hand and for the sake of brevity, we do not find it necessary to discuss the facts of each and every case relied upon by the assessee.

13. In view of our above observations, we do not find any merit in the appeal of the assessee and the same is accordingly hereby dismissed.

Order pronounced in the open court on 10.10.2014.

Sd/-	**Sd/-**
(N.K. Billaiya)	**(Sanjay Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 10.10.2014.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.