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IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE: SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI VIKAS AWASTHY, JUDICIAL MEMBER

ITA No. 582/PN/2009
Assessment Year : 2003-04

Asst. Commissioner of Income Tax, Circle – 1(2), Pune	**Vs.**	**Dhariwal Industries Ltd., Manickchand House, Plot No. 100-101, D-Kennedy Road, Behind Hotel Le-Meridien Road, Pune-411001**
(Appellant)		(Respondent) PAN No. AAACD5896L

ITA No. 588/PN/2009
Assessment Year : 2003-04

Dhariwal Industries Ltd., Manickchand House, Plot No. 100-101, D-Kennedy Road, Behind Hotel Le-Meridien Road, Pune-411001 (Appellant) PAN No. AAACD5896L	**Vs.**	**Asst. Commissioner of Income Tax, Circle – 1(2), Pune** (Respondent)

ITA Nos. 1265 & 1266/PN/2010
Assessment Years : 2004-05 & 2005-06

Asst. Commissioner of Income Tax, Circle – 1(2), Pune	**Vs.**	**Dhariwal Industries Ltd., Manickchand House, Plot No. 100-101, D-Kennedy Road, Behind Hotel Le-Meridien Road, Pune-411001**
(Appellant)		(Respondent) PAN No. AAACD5896L

Assessee By: **Shri Kishor Phadke**
Revenue By: **Shri A.K. Modi**

Date of hearing : **04-06-2015**
Date of pronouncement : **12-06-2015**

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ORDER

PER VIKAS AWASTHY, JM:-

These are set of four appeals impugning the order of Commissioner of Income Tax (Appeals)-I, Pune for the assessment years 2003-04, 2004-05 and 2005-06. In ITA No. 582/PN/2009 the Revenue has assailed the order of Commissioner of Income Tax (Appeals)-I, Pune dated 20-02-2009 for the assessment year 2003-04 passed u/s. 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The assessee in ITA No. 588/PN/2009 has filed cross appeal against the same order of the Commissioner of Income Tax (Appeals)-I, Pune. The Revenue in ITA Nos. 1265 and 1266/PN/2010 has assailed the order of Commissioner of Income Tax (Appeals)-I, Pune dated 01-06-2010 common for the assessment years 2004-05 and 2005-06 passed u/s. 271(1)(c) of the Act.

2. The brief facts of the case are: The assessee is engaged in the business of manufacturing and sale of Pan Masala and Gutka. The assessee had set up its manufacturing undertakings at Godnadi, Pune, Baroda and Hyderabad. The assessee had claimed deduction u/s. 80I of the Act in respect of profits derived from its undertakings at Godnadi and Pune and u/s. 80IA of the Act in respect of profits derived from its undertakings at Baroda and Hyderabad. The Revenue allowed deduction to the assessee in respect of profits derived from manufacturing and sale Pan Masala. However, the claim of deduction in respect of profits derived from manufacturing and sale of Gutka was denied to the assessee. In the first appeal, the Commissioner of Income Tax (Appeals) for the assessment years 1994-95, 1995-96, 1997-98 to 2000-01 the Commissioner of Income Tax (Appeals) allowed the claim of the assessee. The assessee was held to be eligible for deduction u/s. 80I and 80IA on manufacturing and sale of Gutka. The Revenue filed appeal before the

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Tribunal. The Tribunal set aside the order of Commissioner of Income Tax (Appeals) in the assessment years 1994-95, 1995-96, 1997-98 to 2000-01. In the assessment year 2003-04 the Commissioner of Income Tax (Appeals) dismissed the appeal of the assessee by placing reliance on the order of Tribunal in assessee's own case for earlier assessment years. The assessee took the matter to the Hon'ble High Court which is pending for final adjudication.

3. The assessee had claimed deduction u/s. 80I/80IA in respect of profits derived from manufacturing and sale of Gutka by placing reliance on the decision of Allahabad Bench of the Tribunal in the case of Kothari Products Ltd. Vs. ACIT reported as 37 ITD 285. The dispute in the quantum appeal of the assessee was; Whether Gutka (Pan Masala containing 6-7% tobacco) is to be regarded as a tobacco preparation covered by item 2 of the Eleventh Schedule to the Act. It was held in the case of Kothari Products Ltd. Vs. ACIT (supra) that assessee manufacturing 'Zarda Yukt Pan Masala' is entitled for deduction u/s. 32AB and 80I of the Act. In subsequent assessment years similar issue had come up before the Tribunal. The Tribunal taking consistent stand rejected the claim of the assessee in respect of deduction u/s. 80I and 80IA on sale and manufacturing of Gutka.

4. Further, the assessee had received sales tax incentive on generation of power by windmills. The assessee treated the same as capital receipt. The assessee in support of its claim placed reliance on the decision of Special Bench of Mumbai Tribunal in the case of DCIT Vs. Reliance Industries Ltd. reported as 88 ITD 273. The Revenue treated the amount of sales tax incentive as Revenue receipt.

5. The assessee had claimed higher rate of depreciation on items ancillary to the running of windmills viz site development, construction of control room of transformer, labour cost for internal development,

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payment to Suzlon Developers Pvt. Ltd. and payment to Maharashtra Energy Development Agency. The assessee in the assessment year 2002-03 had claimed 100% depreciation on similar items incidental/ancillary to the windmills. The same was disallowed by the Assessing Officer vide assessment order dated 14-01-2005. No penalty proceedings u/s. 271(1)(c) were initiated. The assessee in subsequent year i.e. assessment year 2003-04 claimed higher rate of depreciation on same set of items which was again disallowed by the Assessing Officer vide assessment order dated 31-03-2006. The Assessing Officer at the time of passing the assessment order in subsequent assessment year initiated penalty proceedings u/s. 271(1)(c) of the Act for concealing income.

The second limb of depreciation claim is that the assessee inadvertently claimed 100% rate of depreciation in assessment year 2003-04 on windmill. The rate of depreciation was reduced to 80% w.e.f. assessment year 2003-04. The mistake in claiming higher rate of depreciation was pleaded as bonafide.

6. On all the above three counts, the Assessing Officer levied penalty. Aggrieved by the penalty orders u/s. 271(1)(c) for the assessment year 2003-04, the assessee preferred appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) vide order dated 20-02-2009 deleted penalty with respect to deduction claimed by the assessee u/s. 80I and 80IA and receipts by way of sales tax incentive. However, the Commissioner of Income Tax (Appeals) upheld the penalty with respect to assessee's claim of depreciation on windmills.

In the assessment years 2004-05 and 2005-06 the penalty was levied only on account of assessee's claim of deduction u/s. 80I and 80IA of the Act and receipt of sales tax incentive. The Commissioner of

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Income Tax (Appeals) vide order dated 01-06-2010 deleted the penalty on both the counts.

In the backdrop of these facts the assessee has come in appeal before the Tribunal in assessment year 2003-04 and the Revenue has come in appeal before the Tribunal in assessment year 2003-04, 2004-05 and 2005-06.

7. Shri A.K. Modi representing the Department submitted that the Commissioner of Income Tax (Appeals) has erred in deleting the penalty without properly appreciating the facts. The ld. DR vehemently supported the order of Assessing Officer in levy of penalty u/s. 271(1)(c) of the Act.

8. On the other hand Shri Kishor Phadke appearing on behalf of the assessee submitted that the Commissioner of Income Tax (Appeals) has rightly deleted the penalty as the additions/disallowance which are subject matter of penalty involved substantial question of law. The assessee has filed appeal before the Hon'ble Bombay High Court challenging the order of Tribunal. The Hon'ble High Court has admitted the appeals of the assessee and its group companies on the same issue. The ld. AR placed on record copy of the order of Hon'ble Bombay High Court admitting appeal after framing substantial question of law. The ld. AR contended that substantial question of law is involved in quantum appeals therefore penalty is not leviable. In support of his submissions the ld. AR of the assessee placed reliance on the decision of Hon'ble Bombay High Court in the case of CIT Vs. M/s. Nayan Builders and Developers in ITA No. 415 of 2012 decided on 08-07-2014 and the decision of Pune Bench of the Tribunal in ITA Nos. 580 & 581/PN/2009 in assessee's own case for assessment years 1999-2000 & 2000-01 decided on 30-08-2011.

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9. The ld. AR in support of his grounds raised in ITA No. 588/PN/2009 contended that the assessee had claimed depreciation on structures incidental or ancillary structure to the windmill in the assessment year 2002-03. While framing assessment for assessment year 2002-03, the Assessing Officer did not initiate any concealment penalty. The assessment order for assessment year 2003-04 is a carryover of the decision in assessment year 2002-03. If no penalty proceedings are initiated in assessment year 2002-03 there cannot be levy of penalty in subsequent assessment year for same cause. The ld. AR further submitted that the assessee had inadvertently claimed depreciation @ 100% instead of 80% on windmills. The rate of depreciation was reduced from 100% to 80% in assessment year 2003-04. It was mere calculation error. The mistake is bonafide. In support of his submissions the ld. AR placed reliance on the decision of Hon'ble Supreme Court of India in the case of Price Waterhouse Coopers (P.) Ltd. Vs. CIT reported as 348 ITR 306 (SC).

10. We have heard the submissions made by the representatives of rival sides and have perused the orders of the authorities below. We have also examined the decisions on which the ld. AR has placed reliance in support of his contentions. The penalty has been levied on the assessee in assessment years 2003-04, 2004-05 and 2005-06 in respect of additions/disallowance made on account of:

i. Deduction claimed u/s. 80I and 80IA on manufacturing and sale of Gutka;
ii. Treating sales tax incentive as capital receipt;
iii. Claiming of higher rate of depreciation on structure ancillary to windmills; and
iv. Claiming 100% rate of depreciation on windmill instead of 80%.

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The Commissioner of Income Tax (Appeals) has deleted the levy of penalty in respect of first two issues raised in all the three impugned assessment years. However, the third and fourth issues are raised in the assessment year 2003-04 alone. The Commissioner of Income Tax (Appeals) has confirmed the levy of penalty in respect of disallowance of higher rate of depreciation and depreciation on structures ancillary to windmill.

11. The ld. AR for the assessee has placed on record a copy of the order of Hon'ble Bombay High Court in ITA Nos. 692 to 695, 717, 718 & 734 of 2008 in assessee's own case where the appeals of the assessee have been admitted on the following substantial question of law.

a) *Whether the Tribunal erred in holding that gutka falls in item 2 of the Eleventh Schedule to the Act as a tobacco preparation and chewing tobacco and hence denied deduction claimed by the Appellant under sections 80-I and 80-IA of the Act?*

b) *Whether the Tribunal's conclusion based on arguments which were neither taken by the Respondent No. 1 in the assessment order or by the Departmental Representative in the course of hearing nor brought to the notice of the Appellant by the Tribunal is in gross violation of the principles of natural justice?*

12. The assessee has also placed on record a copy of order of the jurisdictional High Court in ITA Nos. 2446 & 2061 of 2011 in the case of Rasiklal M. Dhariwal (HUF), Pune Vs. ACIT, one of the group concerns of the assessee. The Hon'ble High Court vide order dated 22-02-2013 admitted the appeals on the following substantial question of law:

> *"Whether the Tribunal ought to have held that the benefit received by the Appellant on account of the policy on wind power generation was capital in nature and, therefore, not liable to tax?"*

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13. We are of the considered view that since the first two issues on which the penalty has been levied u/s. 271(1)(c) involves substantial question of law, therefore, no penalty is leviable thereon. The Hon'ble jurisdictional High Court in the case of CIT Vs. M/s. Nayan Builders and Developers (supra) has held that where the debatable and arguable issues are involved and substantial question of law is framed in quantum proceedings, no case for levy of penalty is made out. The Co-ordinate Bench in ITA Nos. 580 & 581/PN/2009 in assessee's own case for assessment year 1999-2000 and 2000-01 decided on 30-08-2011 upheld the order of Commissioner of Income Tax (Appeals) in deleting penalty by placing reliance on the decision of Hon'ble jurisdictional High Court in the case of CIT Vs. M/s. Nayan Builders and Developers (supra). The relevant extract of the order of the Tribunal deleting penalty reads as under:

> *"4. After going through the rival submissions and perusing the material on record, we are not inclined to interfere with the finding of the CIT(A) who has deleted the penalty in question for both the years. The assessee is engaged in the business of manufacturing and sale of Pan Masala and Gutka. For this purpose, it has manufacturing undertaking at difference places. As discussed above, deduction u/s 80-I and 80-IA was claimed in respect of products derived from its undertaking which was denied by the Assessing Officer on the ground that the product manufactured by the assessee viz. gutka or pan masala are tobacco preparations as envisaged under item N o. 2 of Eleventh Schedule of the Act and therefore, not eligible for deduction u/s 80-I and 80-IA of the Act which excludes deduction in respect of items enlisted in the eleventh schedule. Consequently, penalty was also initiated under the provisions of section 271(1)(c) of the Act. However, in quantum proceedings, the CIT(A) granted relief which was reversed by the Tribunal and the order of the Assessing Officer on the said issue was restored. Subsequently, the assessee approached the jurisdictional High Court wherein the matter is claimed to be admitted which has not been disputed on behalf of the revenue. The facts as on date are that the Tribunal disallowed the claim of deduction u/s 80-I and 80-IA which is sub-judice being admitted by*

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the jurisdictional High Court for adjudication. We find that in the case of Nayan Builders (supra) wherein an admission of substantial question of law in quantum proceedings by the jurisdictional High Court lends credence to the bona fides of the assessee in claiming deduction. Once it turns out that claim of the assessee could have been considered for deduction as per a person properly instructed in law and is not completely debarred at all, the mere fact of confirmation of disallowance would not per se lead to imposition of penalty. Since the disallowance in quantum have been held by the jurisdictional High Court to be involving a substantial question of law, the penalty is not exigible under the provisions of section 271(1)(c) of the Act. Moreover, penalty is not automatic on the basis of quantum addition. In view of above discussion, order of the CIT(A) deleting penalties in both the years needs no interference from our side. We uphold the same."

14. In view of the facts of the case and the decision of the Hon'ble Bombay High Court rendered in the case of CIT Vs. M/s. Nayan Builders and Developers (supra), we do not find any reason to interfere with the order of the Commissioner of Income Tax (Appeals) in deleting penalty. Accordingly, all the three appeals of the Revenue are dismissed.

15. Now, we take up the appeal of assessee in ITA No. 588/PN/2009 for the assessment year 2003-04. The assessee in its appeal has impugned the order of Commissioner of Income Tax (Appeals) in not appreciating the fact that penalty proceedings were initiated without fulfilling the conditions laid down u/s. 271(1)(c) r.w.s. 274 of the Act. The assessee has also assailed the levy of penalty in respect of disallowance of claim of depreciation on certain items as part of windmills. However, the ld. AR of the assessee at the time of making submissions confined his arguments only on levy of penalty for disallowance of higher rate of depreciation on certain parts of windmill. The ld. AR submitted that the assessee had claimed higher rate of depreciation in the assessment year 2002-03 which was disallowed. The

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Revenue had not imposed any penalty on the said disallowance. In the assessment order for assessment year 2003-04 identical reasons have been given for disallowing the higher rate of depreciation. Therefore, penalty cannot be levied on same set of facts in the immediately succeeding assessment year. The contention of the ld. AR is that the claim of higher rate of depreciation is bonafide mistake. In support of his submissions reliance has been placed on the decision of Hon'ble Supreme Court of India in the case of Price Waterhouse Coopers (P.) Ltd. Vs. CIT (supra).

16. We find force in the submissions of the ld. AR. No penalty was levied by the Assessing Officer on similar disallowance in the preceding assessment year, therefore, the penalty cannot be levied in succeeding assessment year for the same disallowance. The Co-ordinate Bench of the Tribunal in ITA No. 957/PN/2011 in the case of Shri C.P. Mohandas Vs. DCIT decided on 29-05-2015 has deleted the penalty on similar grounds. The relevant extract of the order of Co-ordinate Bench of the Tribunal is produced as under:

> *"26. So far as the penalty levied on account of agricultural income treated as business income is concerned we find similar addition was made in A.Y. 1998-99 which was upheld by the CIT(A). However, no penalty was levied by the AO on such treatment of agricultural income as undisclosed income. The Pune Bench of the Tribunal in the case of Dynamic Logistics Pvt. Ltd., (Supra) following the decision of the Coordinate Bench of the Tribunal in the case of Orient Press Ltd., reported in 99 TTJ 1091 has held that under identical facts when the AO had not levied penalty u/s.271(1)(c) of the I.T. Act in the preceding year, therefore, it is not open to the AO to impose penalty on the admittedly identical facts for the impugned assessment year. The relevant observation of the Tribunal at para 4 to 6 of the order read as under:*
>
> > *"4. We have considered the rival contentions, perused the relevant material on record and duly considered, the factual matrix of the case as also the applicable legal position.*

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5. We find force in the submission of the learned counsel for the assessee that when the similar notes enclosed with the returns for the assessment years 2000-01, 2002-03, and 2003-04, the Assessing Officer had dropped penalty proceedings, it was not open to the Assessing Officer to impose penalty, on the admittedly identical facts, for this assessment year. A co-ordinate bench of this Tribunal, in the case of Orient Press Ltd. [99 TTJ 1091], has held that if the Assessing Officer has dropped penalty on similar set of facts in the other years, the penalty needs to be dropped on that ground alone. In the said case, the Tribunal has observed as follows:

"4. It is difficult to understand as to how Revenue can defend imposition of penalties for assessment years 1993-94 and 1994-95, when, on the materially similar set of facts, no penalty is imposed for the assessment year 1995-96. The dropping of penalty proceedings for the assessment year 1995-96 is a conscious act by the AO as evident from the specific order dropping the penalty proceedings for that year. During the course of hearing before us, we did ask the Departmental Representative to explain this contradiction in the stand but he was not able to explain the same and he made a vague statement to the effect that the facts of that year may be different. This is unacceptable. In any case, the material facts as evident from the documents before us, were clearly the same so far as the question of declaration was concerned. On one set of facts, in one year, the penalty is dropped, and for the remaining years, the penalties are imposed, are pointed out, for this reason alone, penalties imposed are not sustainable in law."

6. We have no reasons to take any other view of the matter than the view so taken by a co ordinate bench. The material facts being identical inasmuch as on similar set of facts, as were before the Assessing Officer in this year, the penalty proceedings have been dropped for other years, we hold that it was not a fit case for imposition of penalty. The CIT(A) ought to have deleted the same. In any event, even on merits, since assessee had disclosed all material facts by way of a note attached to the income tax return, it cannot be said to be a case of concealment of income or furnishing of inaccurate particulars. Bearing in mind these facts, as also entirety of the case, we deem it fit and proper to delete the impugned penalty of Rs.95,39,005. The assessee gets the relief accordingly."

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27. Since in the instant case the AO has not levied any penalty u/s.271(1)(c) of the I.T. Act on account of treatment of a part of the agricultural income as business income in the assessment year 1998-99, therefore, facts being similar we find no reason as to why penalty should be levied for the impugned assessment year. We further find merit in the submission of the Ld. Counsel for the assessee that the computation of agricultural income from rubber plantation was purely on estimate basis which is on the basis of minimum quantity of 6kg/tree. However, it cannot be said that the production of rubber from a tree will always be at the minimum of 6kg/tree. It may vary from tree to tree. Sometimes it may be more and sometimes it may be less. Therefore, addition may be justified in quantum proceedings. However, the same in our opinion cannot be the basis for imposing penalty u/s.271(1)(c) of the I.T. Act. In this view of the matter we are of the considered opinion that no penalty is leviable on account of treatment of a part of the agricultural income amounting to Rs.5,95,866/- as undisclosed income. We therefore direct the AO to cancel the levy of penalty on this addition. In view of the above discussion, the order of Ld.CIT(A) is modified and the AO is directed to recompute the penalty in the light of the directions given above."

Accordingly, levy of penalty for disallowance of depreciation claim on structures ancillary to windmill is deleted.

17. As far as rate of depreciation is concerned, the assessee has admitted that the mistake in adopting rate at 100% was bonafide. We accept the explanation furnished by the assessee in erroneously applying higher rate of depreciation. It was in the impugned assessment year that rate of depreciation was reduced from 100% to 80%. The assessee applied 100% rate of depreciation instead of 80%. The mistake can be said to be a silly mistake caused by callousness. The assessee should have been more careful in applying the rate of depreciation. In view of the facts of the case, we are of the view that levy of penalty is not justified.

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No other argument was made in respect of grounds raised in the appeal of the assessee. Accordingly, the same are dismissed.

18. In the result, all the three appeals of the Revenue for the assessment years 2003-04, 2004-05 and 2005-06 are dismissed and the appeal of the assessee for assessment year 2003-04 is partly allowed.

Order pronounced on Friday, the 12th day of June, 2015

at Pune

Sd/-	Sd/-
(R.K. PANDA)	**(VIKAS AWASTHY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Pune, Dated: 12th June, 2015
RK/PS

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1 Assessee
2 Department
3 The CIT(A)-I, Pune
4 The CIT-I, Pune
5 The DR, ITAT, "B" Bench, Pune.
6 Guard file.

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By Order

Private Secretary,
Income Tax Appellate Tribunal,
Pune