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

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No. 741/MUM/2016
(Asst. Year : 2009-10)

DCIT-9(3)(1), 215, 2nd Floor, M.K. Road, Churchgate, Mumbai – 400 020.	vs.	M/s. Federal Brands Ltd., A-46,Street No.2, Opp. IDBI Bank, MIDC, Andheri – East, Mumbai – 400 093
PAN No. AABCM1844N		
(Appellant)		(Respondent)

Assessee by : Shri Subodh Ratnaparkhi, CA.
Department By : Ms. Pooja Swaroop, DR

Date of hearing : 17/01/2018.
Date of pronouncement : 06/04/2018.

O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER

The present appeal filed by the Revenue is directed against the order passed by the CIT(A)-16, Mumbai, dated 27/11/2015, which in itself arises from the order passed by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 (for short 'Act'), dated 29/06/2012. The revenue assailing the order of the CIT(A) had raised before us the following grounds of appeal:-

"1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty without appreciating the fact that the assessee had given inaccurate particulars in the computation of income by making patently incorrect claim of depreciation on actual value of Plant

&machinery without deducing therefrom the TUFF subsidy i.e. capital subsidy received from Government.

2. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty holding that multiple opinions are involved in the issue as AO has taken two different opinions in two different years without appreciating the fact that the issue remained silent and never deliberated upon in earlier year's assessment.*
3. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty holding that issue involves multiple opinions without appreciating the fact that there is settled law for treating capital subsidy in the books of account and hence, there could not be two views on the issue."*
4. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the penalty in set-aside proceedings without appreciating the fact considering the same set of facts and circumstance of the case, penalty was confirmed during original appellate proceedings before him."*
5. *The appellant prays that the order of the ld. CIT(A)-16, Mumbai on the above ground be set aside and that of the assessing officer be restored.*
6. *The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid ground of appeal at any time before or at the time of hearing of the appeal."*

2. Briefly stated, the facts of the case are that the assessee company which is engaged in the business of manufacturing of Black Galvanized tubes, steel tabular poles, fitting & accessories and trading in H.R. coil sheet & Galvanized Coil Sheet, had filed its return of income for A.Y. 2009-10 on 30/09/2009, declaring total loss of Rs. 46,29,687/-. The return of income filed by the assessee was processed as such under section 143(1) of the Act. Subsequently, the case of the assessee was taken up for scrutiny assessment under section 143(2) of the Act.

3. During the course of assessment proceedings, the Assessing Officer observed that the assessee during the year under consideration had received capital subsidy of Rs. 1,27,94,951/- from

different banks. The assessee, on being called upon by the Assessing Officer to furnish the details in respect of the said capital subsidy, submitted that the same was given for assistance towards erection of plant and machinery under TUFS scheme of the Textile Ministry. The assessee submitted before the Assessing Officer that a total subsidy of Rs. 1,88,03,407/- was sanctioned in July, 2007, out of which an amount of Rs. 60.08 lakhs was disbursed by Union Bank in the F.Y. 2007-08, while for an amount of Rs. 73.47 lac and Rs. 54.47 lac were disbursed in the F.Y. 2008-09 by Corporation Bank and Saraswat Cooperative Bank, respectively. The Assessing Officer being of the view that as the capital subsidy given to the assessee was towards assistance for purchase of plant & machinery, therefore, the assessee which being a company had to follow mercantile system of accounting, thus remained under an obligation to offer any amount accrued or received for taxation. The Assessing Officer held a conviction that though capital subsidy received by the assessee was not revenue in nature, but however, the same had an indirect bearing on the profits/loss in the profit & loss account, as the assessee was required to reduce the amount of the capital subsidy from the cost of the concerned fixed assets and was supposed to compute the depreciation on such reduced value. It was observed by the Assessing Officer that the assessee instead of reducing the amount of capital subsidy from the value of the fixed assets, had however, reflected the same on the credit side of the balance sheet as a 'Capital reserve'. The assessee in its explanation for not having reduced the amount of the capital subsidy from the cost of the fixed assets, submitted that the subsidy under the TUFS scheme of the Ministry of textiles was received subject to certain terms & consideration mentioned in the sanctioned letter which were required

to be complied over a period of time. It was, thus, the contention of the assessee that in case of any failure on its part in complying with the norms under the TUFS scheme, the benefits availed therein were to be recovered from it. The assessee elaborating on the aforesaid conditions of sanction of subsidy, further submitted that due to precarious business conditions, it was doubtful about its ability to comply with the terms and conditions on which the subsidy was sanctioned, particularly as the project was facing adverse market and demand condition. The assessee submitted before the Assessing Officer that as it envisaged the likelihood of reimbursement of the subsidy on its part on account of failure in payment of instalment and interest, therefore, it was for the said reason that the capital subsidy was reflected as a liability in the balance sheet and not deducted from the capital cost of plant & machinery. However, the aforesaid submissions of the assessee did not find favour with the Assessing Officer, who prompted by a strong conviction that the assessee remained under a statutory obligation to have reduced the amount of capital subsidy from the cost of the fixed assets, therefore, reworked out the depreciation on the fixed assets after reducing the amount of the capital subsidy therefrom, as a result whereof an excess depreciation of Rs.35,92,013/- claimed by the assessee by failing to reduce the capital subsidy from the cost of the fixed assets was worked out and added back to the returned income of the assessee. The said modification by the A.O of the entitlement of the assessee towards claim of depreciation was accepted by the assessee and not carried in further appeal.

4. The Assessing Officer after the culmination of the assessment proceedings, called upon the assessee to show-cause as to why penalty under section 271(1)(c) of the Act may not be imposed on it

in respect of excess depreciation of Rs. 35,92,013/- so claimed by it. The explanation of the assessee wherein its main thrust was on two aspects, viz. (i) that as the subsidy was a conditional subsidy under TUFS scheme, which was refundable on the failure on the part of the assessee to fulfil the requisite conditions, therefore, the same was not reduced from the cost of the fixed assets; and (ii) that as the said treatment on the part of the assessee in not reducing the amount of capital subsidy from the cost of fixed assets in the immediately preceding year, viz. A.Y. 2008-09 was accepted by the Assessing Officer in the assessment framed under section 143(3) of the Act for the said year, therefore, the assessee had no reason to doubt the veracity of its aforesaid claim. The assessee taking support of its aforesaid submissions and placing reliance on a host of judicial pronouncements tried to impress upon the Assessing Officer that no penalty for furnishing of inaccurate particulars under section 271(1)(c) was called for in its hands. However, the Assessing Officer not persuaded by the aforesaid contentions of the assessee, being of the view that the latter had filed inaccurate particulars and sought to evade tax by claiming excess depreciation of Rs. 35,92,013/-, thus, imposed penalty of Rs. 11,09,932/-.

5. Aggrieved, the assessee assailed the penalty imposed by the A.O under Sec. 271(1)(c) in appeal before the CIT(A). During the course of appellate proceedings, the assessee after reiterating the submissions which were made before the Assessing Officer, further submitted that as the subsidy so received was subject to certain terms and conditions which were mandatorily required to be complied over a period of time, therefore, the amount of this subsidy was reflected on the credit side of the balance sheet as a "capital

reserve", which treatment accorded by the assessee was accepted by the Assessing Officer while framing the assessment in its hands for the immediately preceding year, viz. A.Y. 2008-09, vide his assessment order passed under section 143(3), dated 24/11/2010. The assessee taking support of the aforesaid contentions submitted before the CIT(A) that now when the Assessing Officer after necessary scrutiny had accepted the treatment given by the assessee to capital subsidy in the immediately preceding year, viz. A.Y. 2008-09, therefore, as it stood clearly revealed that two set of views of the revenue emerged as regards the treatment of the capital subsidy, thus, no penalty under Sec. 271(1)(c) was liable to be imposed on the assessee for adopting one of the said view which in itself had been accepted as the correct view by the revenue in the assesses own case for the immediately preceding year, viz. A.Y 2008-09. The CIT(A) after deliberating on the contentions of the assessee, however, did not find favour with the same and sustained the penalty of Rs. 11,09,932/- imposed under Sec. 271(1)(c) by the Assessing Officer.

6. The assessee being aggrieved with the order of the CIT(A) upholding the penalty imposed by the A.O under section 271(1)(c), had carried the matter in appeal before us. The ld. Authorised Representative (for short 'A.R') for the assessee after taking us through the facts of the case, submitted that a similar treatment on the part of the assessee in not reducing the amount of capital subsidy from the cost of the fixed assets, and rather showing the same as a liability in the balance sheet, was accepted by the Assessing Officer while framing assessment under section 143(3) in its own case for the immediately preceding year, viz. A.Y. 2008-09. The ld.A.R in order to fortify his aforesaid contention, took us through the copy of

assessment order for A.Y. 2008-09 [Page Nos. 9–13] of the assessee's paper book (for short, 'APB'). The ld. AR in order to impress upon us that the Assessing Officer while framing the assessment for the immediately preceding year, viz. A.Y. 2008-09 was well conversant with the fact that the capital subsidy was not reduced by the assessee from the cost of the fixed assets, but rather, had been reflected as a "capital reserve" in the balance sheet, took us through the relevant extracts of the balance sheet for the said preceding year (Page Nos. 38–40) of 'APB'. The ld. AR further submitted that as the assessee remained under a *bonafide* belief that in case of non-compliance of the conditions on which capital subsidy had been sanctioned, the same was supposed to be refunded, therefore, for the said reason the same was not reduced from the cost of the fixed assets and was shown as a liability in the balance sheet. The Ld. A.R taking support of the aforesaid facts, submitted that now when the said view of the assessee was accepted by the Assessing Officer in the immediately preceding year, viz. A.Y. 2008-09, therefore, it could safely be concluded that the issue as regards the treatment of capital subsidy, viz. (i) that as to whether the same was to be reduced from the cost of the fixed assets; or (ii) the same was to be shown as a liability in the balance sheet, remained a debatable one. The ld. A.R taking support of the fact that as the issue under consideration was not free from doubts and debate, specifically when a view contrary to that arrived at by the Assessing Officer during the year under consideration was taken by him in the immediately preceding year, viz. A.Y. 2008-09, therefore, on the said count itself no penalty under section 271(1)(c) was called for in the hands of the assessee. The ld. A.R further submitted that even otherwise as the complete details in respect of the capital subsidy

received and the computation of depreciation was furnished by the assessee along with its return of income for the year under consideration, therefore, merely for the reason that the said claim of depreciation so raised by the assessee was modified by the Assessing Officer by taking recourse to another view, no penalty under section 271(1)(c) could have validly be imposed in its hands on the said count. It was submitted by the ld. A.R that the CIT(A) after duly appreciating the facts of the case in the backdrop of the settled position of law had rightly deleted the penalty imposed by the Assessing Officer. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the order passed by the Assessing Officer under section 271(1)(c) of the Act. It was submitted by the ld. D.R that as the assessee had raised a wrong claim of excess depreciation, therefore, the Assessing Officer had rightly imposed penalty under section 271(1)(c). It was submitted by the ld. D.R that the CIT(A) failing to appreciate the facts in the right perspective, had thus erred in deleting the penalty which was rightly imposed by the Assessing Officer under section 271(1)(c).

7. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present appeal is sought for adjudicating as to whether the penalty of Rs. 11,09,932/- imposed by the Assessing Officer under section 271(1)(c) in respect of excess claim of depreciation by the assessee is sustainable in the eyes of law, or not. We have deliberated on the facts of the case and find substantial force in the contention of the ld. A.R that as the assessee envisaged the likelihood of reimbursement of the subsidy under the TUFS scheme for failure on its part in payment of instalment and interest, therefore, it was for the said

reason that the same was reflected as a liability in the balance sheet and not deducted from the capital cost of plant & machinery. We further find that as a similar treatment given by the assessee to the amount of such capital subsidy in the immediately preceding year, viz. A.Y. 2008-09, after thorough scrutiny in the course of the assessment framed under section 143(3) in the said preceding year was accepted by the Assessing Officer, thus, the said fact in itself fortifies the claim of the assessee that it remained under a *bonafide* belief that no infirmity did emerge from not reducing the capital subsidy from the cost of the fixed assets and reflecting the same in a similar manner as in the preceding year, as a liability in the balance sheet for the year under consideration. We are further persuaded to be in agreement with the claim of the ld. A.R that though during the year under consideration the Assessing Officer discarded the claim of the assessee that the capital subsidy under the TUFS scheme was not to be reflected as a liability in the balance sheet, but rather, was to be reduced from the cost of the fixed assets, however, by not dislodging or rather accepting a similar claim of the assessee while scrutinizing its case for the immediately preceding year, viz. A.Y 2008-09, thus, undoubtedly established that there were two plausible views of the revenue as regards the treatment to be accorded to such capital subsidy sanctioned to the assessee. We are further of the view that as the assessee during the year under consideration had duly disclosed the complete details in respect of the capital subsidy received under the TUFS scheme along with the calculation of the depreciation on the fixed assets, therefore, though the treatment given by the assessee to the capital subsidy received under the TUFS scheme, may not have found favour with the Assessing Officer, therein leading to a consequential reworking of the depreciation on

his part, but however, in the backdrop of the fact that a complete disclosure of the facts pertaining to the capital subsidy and computation of the deprecation on the said fixed assets was furnished by the assessee as part of the enclosures forming part of its return of income, therefore, no penalty under Sec. 271(1)(c) for the said reason also was liable to be imposed on it. We find that our aforesaid view stands fortified by the judgment of the **Hon'ble Supreme Court** in the case of **CIT vs. Reliance Petro Products Pvt. Ltd. [322 ITR 158 (SC)]**, wherein the Hon'ble Apex Court observing that disallowance of a claim by itself would not tantamount to furnishing of inaccurate particulars of income by the assessee, leading to levy of penalty under section 271(1)(c), had held as under:-

> *"..... 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 Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature."*

We further find that the issue that an excess claim of depreciation by an assessee for bonafide reasons would not justify imposition of penalty under section 271(1)(c) had also been deliberated upon by the **Hon'ble High Court of Bombay** in the case of **CIT vs. Somany Evergreen Knits Ltd. (2013) 352 ITR 592 (Bom.)**

8. We, thus, in the backdrop of our aforesaid observations are of the considered view that no penalty under section 271(1)(c) in

respect of excess claim of depreciation by the assessee under the aforesaid set of circumstances was liable to be imposed in its hands. We, thus, not finding any infirmity in the order passed by the CIT(A) deleting the penalty of Rs. 11,09,932/- imposed by the Assessing Officer under Sec. 271(1)(c), therefore, uphold his order.

9. In the result, appeal filed by the Revenue is dismissed in terms of our aforesaid observations.

Order Pronounced in the open Court on this 06th day of April, 2018.

Sd/-	sd/-
(B.R BASKARAN)	**(RAVISH SOOD)**
Accountant Member	**Judicial Member**

Dated : 06th April, 2018.

vr/-

Copy to:

1. *The Assessee-* M/s. Federal Brands Ltd., A-46,Street No.2, Opp. IDBI Bank, MIDC, Andheri – East, Mumbai – 400 093
2. *The Revenue* – DCIT-9(3)(1), 215, 2nd Floor, M.K. Road, Churchgate, Mumbai – 400 020.
3. *Ld.Pr.CIT – 9, Mumbai.*
4. *Ld. CIT(A)-16, Mumbai.*
5. *The D.R., Mumbai.*
6. *Guard file.*

By order

(Dy./Asst. Registrar),
ITAT, Mumbai.