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IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH "B" NEW DELHI)  
BEFORE SHRI RAJPAL YADAV AND SHRI R.C. SHARMA

I.T.A. No. 4147/Del/2009  
Assessment Year: 2004-05

Income-tax Officer,  
Ward-4,  
Panipat.

(Appellant)

Vs. M/s. Flora Exports,  
Sector 29, HUDA,  
Panipat.

(Respondent)

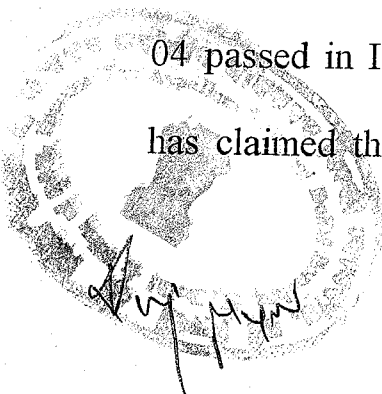
Appellant by: Shri Manish Gupta, DR  
Respondent by: Shri Ved Jain, CA

ORDER

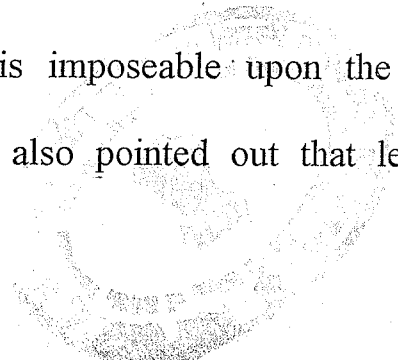
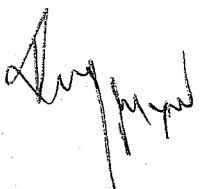
PER RAJPAL YADAV: JUDICIAL MEMBER

The revenue is in appeal before us against the order of learned CIT(Appeals) dated 20.08.2009 passed for assessment year 2004-05. The solitary grievance of the revenue is that learned CIT(Appeals) has erred in deleting the penalty imposed under sec. 271(1)(c) of the Income-tax Act, 1961.

2. The learned counsel for the assessee at the very outset submitted that the issue in dispute is squarely covered in favour of the assessee by the order of the ITAT in the case of assessee for assessment years 2002-03 and 2003-04 passed in ITA Nos. 12 and 13/Del/09. He pointed out that the assessee has claimed the deduction under sec. 80-IB on export incentive i.e. DEPB



and duty-draw back. The Assessing Officer on the strength of Hon'ble Punjab & Haryana High Court decision in the case of Liberty Shoes reported in 207 CTR 243 excluded the amount of export incentive from the eligible profit for computing deduction under sec. 80-IB. He initiated penalty proceedings under sec. 271(1)(c) of the Act and ultimately imposed the penalty for furnishing inaccurate particulars. Similar claim was made in assessment years 2002-03 and 2003-04. The penalty was imposed by the Assessing Officer under sec. 271(1)(c) and it was confirmed by the learned CIT(Appeals). The ITAT has deleted the penalty vide its order dated 11<sup>th</sup> September, 2009. In the present year, learned CIT(Appeals) has followed the order of the ITAT passed in the case of M/s. Oriental Rug Company and other similarly situated assesseees of Panipat. Learned CIT(Appeals) has made a reference to the large number of such orders on page 4 and 5. learned CIT(Appeals) has held that the issue with regard to inclusion or exclusion of export incentive from the eligible profit for computation of deduction admissible under sec. 80-IB of the Act is a debatable issue. Hence, no penalty is imposeable upon the assessee. The learned counsel for the assessee also pointed out that learned CIT(Appeals) has reproduced the



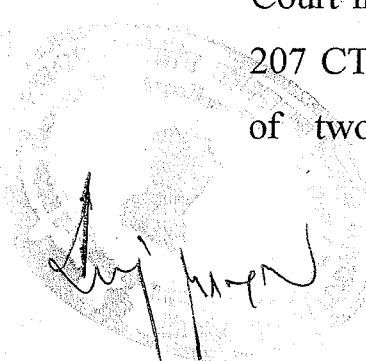
order of the ITAT in the case of M/s. Oriental Rug Company in ITA Nos. 3629 & 3630/Del/08.

3. Learned DR was unable to controvert the contentions of learned counsel for the assessee.

4. We have considered the rival contentions and gone through the records carefully. We find that the identical issue has been considered by the ITAT in the case of M/s. Oriental Rug Company as well as in the assessee's own case. The facts and circumstances and the discussion made by the ITAT in the case of M/s. Oriental Rug Company read as under:

"2. The facts on all vital points are not in dispute between the parties. The assessee has claimed deduction under sec. 80-IB on export incentive i.e. DEPB and duty draw back, which was disallowed to them.

3. In the cases of M/s. Oriental Rugs Company Ltd., the assessments have been framed under sec. 143(3) read with sec. 147 on 18.11.2005 in both the assessment years wherein this deduction was disallowed to the assessee by following the order of ITAT passed in the case of ACIT vs. M/s. Liberty India, Panipat in ITA No.5433/Del/04. On appeal, learned CIT(Appeals) confirmed the disallowance by following the order of Hon'ble jurisdictional High Court in the case of M/s. Liberty India, Panipat Vs. ACIT reported in 207 CTR 243. Similarly, the disallowance has been made in the cases of two other assesseees which have been confirmed by the

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CIT(Appeals) on the strength of Hon'ble High Court's decision in the case of Liberty India (supra). The Assessing Officer was satisfied that the assessee has furnished inaccurate particulars by claiming such deduction and, therefore, initiated penalty proceedings. He imposed a penalty under sec. 271(1)(c) of the Act in the cases of all the assesseees.

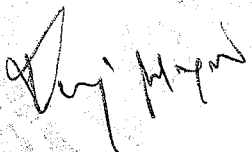
4. Appeal to the CIT(Appeals) did not bring any relief to the assessee. learned Ist Appellate Authority has confirmed the penalty by relying upon the decision of Hon'ble Punjab & Haryana High Court in the case of Liberty India (supra).

5. Shri Ved Jain, learned counsel for the assessee in the cases of Oriental Rugs has raised four fold submissions. He firstly contended that there is no concealment made by the assessee. All the particulars were duly disclosed by the assessee along with the return of income. The disallowance has been made on the basis of the information disclosed by the assessee. He pointed out that once an assessee has made a bona fide claim then assessee would not be visited with penalty simply for the reason that Assessing Officer has taken a different opinion on the issue. To buttress his contention, he relied upon the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Budhewal Co-op. Sugar Mills Ltd. reported in (2008) 6 DTR 31. In this judgment, Hon'ble High Court has held that where an assessee does not include a particular item in taxable income under a bona fide belief that he is not liable so as to include it then it would not be right to condemn such steps as a "false" return inviting imposition of penalty. He further relied upon the order of the ITAT in

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the case of ACIT vs. Arisudana Spinning Mills Ltd. reported in (2009) 19 DTR 1 wherein a claim made under sec. 80-IA was disallowed by the Assessing Officer. The ITAT deleted the penalty on the ground that merely non allowance of such claim would not suffer from the vice of non-disclosure of complete facts.

6. In his second fold of submissions, he submitted that the issue of allowability of deduction under sec. 80-IB in respect of duty draw back, DEPB has been a controversial one. He pointed out that the Hon'ble Delhi High Court in the case of CIT vs. Ritesh Industries reported in 274 ITR 324 has upheld the allowance of such deduction. Similarly the ITAT in the case of Anand Internatinal decided the issue in favour of the assessee vide order dated 13.5.2005. The ITAT in the case of DCIT vs. Eltek SGS (P) Ltd. reported in 10 SOT 178 has held that duty draw backs are eligible for deduction under sec. 80-IB. The Hon'ble Delhi High Court has upheld this order and the judgment is reported in 300 ITR 6. He also pointed out that there were large number of orders at the level of ITAT wherein it has been held that deduction under sec. 80-IB would be admissible on incentives. The contrary view was taken by the ITAT in the case of M/s. Liberty India (supra) and this view has been upheld by the Hon'ble Punjab & Haryana High Court. The assesseees have filed their returns in 2001 and 2002 and the decision of Hon'ble High Court came in September 2006 i.e. subsequent to the filing of return, prior to this decision there are other decisions in favour of the assessee also. He further pointed out that SLPs are still pending against the judgments of Hon'ble Delhi High Court as well as of Hon'ble Punjab & Haryana High Court at the



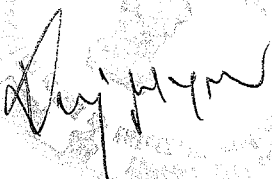
instances of aggrieved parties. Thus, the issue is a debatable one and no penalty can be imposed in such circumstances. He relied upon the decisions of Hon'ble Rajasthan High Court in the case of CIT vs. Harshvardhan Chemicals reported in 259 ITR 212; CIT Vs. Tek Ram reported in 300 ITR 354 and the order of the ITAT in the case of ACIT vs. Vijay Karan Hotels 10 DTR 225. In all these cases, it has been held that where there is diversion of opinion amongst the Hon'ble High Courts on a particular issue, the claim of assessee cannot be said to be lacking bona fide for visiting the assessee with penalty.

7. In his next fold of submissions, assessees have contended that they have made the claim on the opinion of experts on this issue. In support of their claim they have attached the requisite audit report with their returns of income. Thus, their claims are fortified by the opinion of CA. No penalty can be imposed in such circumstances upon the assessees. He relied upon the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Deep Tools 274 ITR 603. He further relied upon the order of the ITAT in the case of Panchnama Hotels (P) Ltd. vs. DCIT 47 TTJ 282 and Mohan Co-op. Industry Estates Vs. ACIT 50 TTJ (Del.) 504. He also relied upon the order of the ITAT, Chennai rendered in the case of Gen. Granite Karnataka vs. DCIT 18 DR 358 wherein it has been held that penalty is not automatic. If an assessee has made a bona fide claim of deduction then penalty cannot be levied. The learned counsel for the assessee placed on record copies of all these orders/judgments in the compilation. On the other hand, learned DR relied upon the orders of

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the revenue authorities below and contended that once decision of jurisdictional High Court was against the assessee, they should have not claimed the deduction on the incentives in the shape of DEPB and duty draw back.

8. We have duly considered the rival contentions and gone through the records carefully. There is no dispute on facts that assesseees have disclosed complete details of their claims in the returns of income. The assesseees have made their claims on the basis of advise given by the expert on the subject. The audit report and the claim in necessary proforma were submitted along with the returns. From perusal of the record, it revealed that claim of the assesseees were bona fide claim. There were large numbers of orders at the end of the ITAT in favour of the assesseees. The issue whether deduction under sec. 80-IB would be admissible on duty draw back, and DEPB is still a debatable issue. There are divergent opinion on this issue by the different Hon'ble High Court. The Hon'ble Delhi High Court is of the opinion that deduction under sec. 80-IB would be admissible on duty draw back and DEPB. In the cases of Lakhvinder Singh in ITA No.5169/Del/04 decided on September 28, 2005, then in the case of ACIT vs. Shri. Vipin Sardhana in ITA No.5174/Del/04 decided on 17.6.2005 and again in the case of ITO vs. Ess Kay Enterprises, ITAT Delhi Benches have allowed the deduction to the assessee under sec. 80-IB on duty draw back. Hon'ble Punjab & Haryana High Court in the case of Liberty Shoes (supra) has held that deduction under sec. 80-IB would not be admissible to the assessee. The SLPs have been filed against the decisions of Hon'ble Punjab & Haryana High Court



as well as against the decisions of Hon'ble Delhi High Court in the Hon'ble Supreme Court which are stand admitted as informed by the learned representative of the assessee. Thus, prima facie, it indicates that this issue was a debatable one. Hon'ble Punjab & Haryana High Court in the case of CIT vs. Budh Well Co-operative Sugar Mills (supra.) has held that if an assessee has made a bona fide claim on the basis of law laid down by various Hon'ble High Courts then penalty would not be levied upon such an assessee merely on the ground that his claim was disallowed. Similarly, the Hon'ble Rajasthan High Court in the case of CIT vs. Harshvardhan (supra) has held that if an assessee claims some deductions which are debatable then it could not be said that assessee has concealed any income or furnished inaccurate particulars of income which exposed him with the penalty proceedings under sec. 271(1)(c) of the Act. Similarly, Hon'ble Punjab & Haryana High Court in the case of CIT vs. Tek Ram (supra) has considered this issue. In this case, assessee did not show enhanced compensation received by him on account of acquisition of his land as his income. The Assessing Officer made the addition and levied penalty under sec. 271(1)(c). Hon'ble Court has held that matter relating to taxability of enhanced compensation receivable by the assessee was still in dispute and two views were clearly possible and, therefore, no penalty can be imposed. In the present appeals also, two views were clearly possible which were supported by orders of the ITAT as well as decisions of Hon'ble High Courts. In such situation, it cannot be said that assessee have concealed income or furnished inaccurate particulars. There is no allegation by the Assessing Officer

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that assessee have not disclosed the complete particulars. The only allegation is that assessee have claimed deduction on DEPB and duty draw-back under sec. 80-IB which is not admissible to them.

9. Taking into consideration all these facts and circumstances, we allow all these appeals and delete the penalty”

5. There is no disparity on facts. The findings of the ITAT in the assessee's case for assessment years 2002-03 and 2003-04 are also on the similar lines. The learned CIT(Appeals) has considered all these aspects before deleting the penalty and on due consideration of the order of the learned CIT(Appeals) coupled with the discussion made by the ITAT in the assessee's own case, we do not see any reasons to interfere in the order of the learned CIT(Appeals).

6. In the result, the appeal filed by the revenue is dismissed.

Decision pronounced in the open court on 28.01.2010

( R.C. SHARMA )  
ACCOUNTANT MEMBER

( RAJPAL YADAV )  
JUDICIAL MEMBER

Dated: 28/01/2010  
Mohan Lal

ITR NO 41 27/04

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR. ITAT

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ASSISTANT REGISTRAR

Income Tax Appellate Tribunal

Room No. 401, 4th Floor

Chhatrapati Shivaji Maharaj, New Delhi

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