

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD " B " BENCH – AHMEDABAD

**Before Shri S. S. Godara, JM & Shri Manish Borad, AM.**

ITA No. 59/Ahd/2014  
Asst. Year: 2007-08

M/s Cera Sanitaryware Ltd., Madhusudan House, Opp. Navrangpura Tel. Exchange, Navrangpura, Ahmedabad.	Vs.	ACIT (OSD), Range-1, Ahmedabad.
Appellant		Respondent
PAN AABCM9244N		

Appellant by	Smt. Urvashi Sodhan, AR
Respondent by	Shri James Kurien, Sr. DR

Date of hearing: 22/12/2016  
Date of pronouncement: 04/01/2017

**O R D E R**

**PER Manish Borad, Accountant Member.**

This appeal of assessee for Asst. Year 2007-08 is directed against the order of Id. CIT(A)-III, Ahmedabad, dated 27/11/2013 in appeal No.CIT(A)-III/ACIT(OSD)/R.1/13-14, assigned by CIT(A)-IV, vide CCIT(CCA), Ahmedabad's order No.CCIT/Abd/HQ/Tech/Jurisdiction (Appeals)/2013-14 dated 21/08/2013. This order arises out of the order u/s 271(1)(c) of the I.T. Act, 1961 (in short the Act) framed on 30.03.2012 by ACIT (OSD), Range-1, Ahmedabad.

2. Assessee has raised various grounds which are not in consonance with Rule-8 of ITAT Rules, 1963. However, sole grievance of the assessee is confined to a single issue against the order of Id. CIT(A) confirming penalty u/s 271(1)(c) of the Act on disallowance of depreciation of Rs.7,80,826/-.

3. Briefly stated facts are that the assessee is a limited company engaged in the business of manufacturing and trading of ceramics. Return of income for Asst. Year 2007-08 was filed on 29.10.2007 declaring total income of Rs.11,43,52,419/-. The case was selected for scrutiny assessment. Necessary details were filed and the case was discussed. Assessment u/s 143(3) of the Act was framed on 22.12.2009 assessing total income at Rs.11,91,42,258/- after making addition of Rs.47,89,841/- which inter alia included disallowance of depreciation on show room building at Rs.7,80,826/-. The present appeal is confined to the levy of penalty u/s 271(1)(c) of the Act on disallowance of depreciation of Rs.7,80,826/-.

4. Brief facts relating to this disallowance of depreciation of Rs.7,80,826/- are that assessee purchased a show room building at Mumbai on 5.3.2007 for a sum of Rs.1,51,18,160/-. Assessee started construction of "Bath Studio" in this showroom which was completed and put to use on 31.05.2007. For Asst. Year 2007-08 assessee claimed depreciation of Rs.7,80,826/- on the cost of show room building of Rs.1,51,18,160/-. However, during the course of assessment proceedings Id. Assessing Officer observed that the building was actually put to use on 31.05.2007 i.e. after the

completion of work of "Bath Studio". As the asset was not put to use before 31<sup>st</sup> March, 2007 Id. Assessing Officer disallowed depreciation of Rs.7,80,826. In quantum appeal relating to this issue assessee lost both before Id. CIT(A) as well as the Tribunal vide ITA No.744/Ahd/2011.

5. Penalty proceedings were initiated u/s 271(1)(c) of the Act and penalty was imposed for furnishing of inaccurate particulars of income by making wrong claim of depreciation of Rs.7,80,826/-. In appeal before Id. CIT(A) assessee could not succeed as Id. CIT(A) confirmed the penalty u/s 271(1)(c) of the Act . Relevant para reads as under:-

13. When the present case is examined in view of this legal position, it is found that in this case appellant claimed depreciation of Rs. 7,80,826/- in respect of show room at Mumbai. However, it was found by AO during the course of assessment proceedings that appellant has capitalized work done for "Bath Studio" in this building wherein the date of user is shown at 31-05-2007. Obviously, the building could not be used before this date and therefore the claim of depreciation by appellant during the year was wrong. This cannot be considered a bonafide omission or mistake on the part of appellant. In such a situation, case of appellant clearly falls in the category (b) of Para 12 as mentioned above. I therefore hold that levy of penalty u/s. 271(1)(c) is fully justified in this case in view of decision of Hon'ble Supreme Court in the case of Dharmendra Textile. It would be a travesty of truth and justice to express a view to the contrary. Now a days only a microscopic minority of returns are selected for detailed scrutiny. The taxpayers are aware of this and many of them try to take undue advantage of this by filing incorrect income. This tendency needs to be strongly discouraged. It is therefore necessary that concealment of income is penalized suitably so that it acts as effective deterrence for other taxpayers. Keeping in view all these facts, I hold that levy of penalty u/s. 271(1)(c) is justified in this case. However, AO is directed to restrict levy of penalty in respect of amount of Rs. 7,80,826/- only on account of wrong claim of depreciation as mentioned above. No penalty is leviable in

respect of addition of Rs. 24,30,554/- on account of disallowance of Amortization of ESOP because in view of different Court decisions the issue is highly debatable and two opinions are possible on the same. Another addition of Rs. 1,61,000/- is in respect of disallowance of preliminary expenses u/s. 35D. This addition is also of technical nature in respect of which levy of penalty is not justified. Ground no. 1 of appeal is thus partly allowed.

6. Aggrieved, assessee is now in appeal before the Tribunal.

7. Ld. AR submitted that assessee company is having a huge turnover and has declared income of Rs.11,43,52,419/-. Books of account are regularly audited. Depreciation on building was claimed with the contention that the building was acquired on 5.3.2007 and work relating to 'Bath Studio' was started. The basis of claiming depreciation of Rs.7,80,826/- was that the showroom building is a separate asset in itself and is capable to be put to use and further as per the provisions of section 32 of the Act, depreciation is to be allowed on assets which are owned and used for the purpose of business and as the building was purchased and its use was started by way of starting construction of 'Bath Studio', depreciation was claimed on the cost of the building. This claim was duly supported by the audit report of the Chartered Accountant and it was a valid and bona fide claim. Ld. AR further submitted that there was no concealment of income or furnishing of inaccurate particulars of income because all the necessary information were very well available on record and it was merely because that assessee claimed it knowingly that it is valid claim whereas the assessing authority denied it. In such circumstances penalty u/s 271(1)(c) of the Act cannot be levied.

8. On the other hand, Id. DR supported the orders of lower authorities.

9. We have heard the rival contentions and perused the material on record. Sole grievance of the assessee is against the order of Id. CIT(A) confirming levy of penalty u/s 271(1)(c) of the Act on disallowance of depreciation of show room building of Rs.7,80,826/-. We observe that assessee is a limited company and has declared income of Rs.11,43,52,419/-. Books of accounts are audited. Issue in this appeal revolves round the disallowance of depreciation of Rs.7,80,826/- claimed by assessee on show room building at Mumbai purchased by assessee on 5.3.2007 at Rs.1,51,18,160/-. Assessee started construction for making a "Bath Studio" in the show room building which was completed on 31.5.2007. Claim of assessee of depreciation of Rs.7,80,826/- on the show room has been denied by the Assessing Officer as in his view the show room building was put to use only after the completion of construction of Bath Studio and the date of completion of construction is 31.5.2007 and therefore, no depreciation was allowable for F.Y.2006-07 on the cost of show room building. We further observe that when the quantum issue came up before the Tribunal in ITA No.744/Ahd/2011 disallowance of depreciation was confirmed by the Co-ordinate Bench by observing as follows :-

4. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below. The undisputed facts are that the assessee had purchased the premises on 05/03/2007 and for

the purpose of "Bath Studio" the furnishing and other work were carried out from March-07 to 31<sup>st</sup> May-2007. The contention of the assessee is that the premises were put to use for business purpose as the furnishing of the premises for the purpose of establishing "Bath Studio" commenced in the month of March-2007, hence the assessee is entitled for claimed depreciation. The AO in his order has observed that the asset has not been put to use during the year rather after acquisition, the "Bath Studio" was being built on it. Under these facts, we have to examine whether the assessee would be entitled for the depreciation as claimed despite the undisputed fact that the assessee had only purchased the building during the year under consideration and carried out certain furnishing work for the purpose of establishing the "Bath Studio". The contention of the assessee is that the premises were put to use for business purpose as the work of furnishing was being carried out for the purpose of establishing a "Bath Studio". Therefore, the depreciation on the premises cannot be denied as per provisions of section 32 of the I.T. Act, 1961. In support of this contention, the assessee had relied upon the following case-laws :-

1. *CIT vs. India Tea & Timber Trading Co. (1966) 221 ITR 857 (Gauh).*
2. *Capital Bus Services Pvt.Ltd. vs. CIT (1980) 123 ItR 404 (Del)*
3. *CIT Vs. G.N. Agrawat (1996) 217 ITR 250 (Bom).*
4. *CIT vs. Vayithri Plantations (1981) 128 ITR 675 (Mad.)*
5. *Liquidators ofPursa Ltd. vs. CIT (1954) 25 ITR 265 (SC)*
6. *CIT vs. Geotech Construction Corpn. 162 CTR 528 (Ker.)*
7. *CIT vs. Pepsu Road Transport Corpn. (2002) 253 IT 303 (P&H).*
8. *CIT vs. Refrigeration & Allied Industries Ltd. 113 Tax man 103(Dei)"*

4.1. We find that the Hon'ble Gauhati High Court in the case of CIT vs. India Tea and Timber Trading Co. reported at (1996) 251 ITR 857(Gauh) concurred the view of other High Courts that the word "used" for business purpose should have a wider import including active as well as passive usage of the asset. Further, we find that the Hon'ble Gauhati High Court in the said judgement has observed that the Hon'ble Gujarat High Court in the case of CIT vs. Suhrid Geigy Ltd. (reported at 133 ITR 884) has taken a contrary view. We find that the Hon'ble Gujarat High Court in the case of CIT vs. Suhrid Geigy Ltd. has observed as under:-

*When the cup is being filled with the drink it cannot be said that one is engaged in drinking. A similar question arises when the depreciation is claimed in respect of a building constructed in the course of the erection of a new plant. Can depreciation allowance be claimed for the building for a period:*

- (1) before the completion of the installation of machinery in the said building;
- (2) before it starts functioning effectively;

*(3) before the production (even trial run) is commenced and the business of the company of manufacturing an article with the aid of the said machinery has commenced?*

*Can depreciation be allowed in these facts and circumstances when it is allowable upon the property being used for or in the bus/ness of the said unit of the company? In other words, the question is whether it can be said that the building has been used in the business even before the articles, for production of which the plant is set up, have not been produced and the machinery itself has become functional later on."*

4.2. The Hon'ble Gujarat High Court in the case of *Suhrid Geigy Ltd.(supra)* held as under:-

*3. The view taken by the Tribunal is that the date on which the machinery installed in the building became functional is irrelevant. What is relevant is the date on which the machinery was installed in the building. Now, provisions on which reliance is placed for claiming depreciation allowance, namely s. 32(1) r/w r. 5 as they stood at the relevant time (relevant for the assessment in question, i.e., 1965-66) may be quoted.*

*Sec. 32(1), so far as it is material for our purposes, reads as under:*

*"32(1) In respect of depreciation of building, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession, the following deductions shall, subject to the provisions of s. 34, be allowed.....*

*(ii) in the case of building, machinery, plant or furniture, other than ships covered by cl. (i), such percentage on the written down value thereof, as may in any case or class of cases be prescribed.....,"*  
*(Emphasis supplied)*

*Rule 5 of the rules, so far as it is material for our purposes reads as under:*

*"5. Depreciation—(1) Subject to the provisions of sub-rr. (2) and (3), the allowance under cl. (i) or cl. (ii) or sub-s. (1) of s. 32 in respect of depreciation of building, machinery, plant or furniture shall be at a percentage of the actual cost or the written down value, as the case may be, equal to (i) 100 per cent, (ii) fifty per cent, or (Hi) nil per cent of the number shown in the corresponding entry in the second column of the statement in Part I Appendix I to these Rules according as the building, machinery, plant or furniture, have been used by the assessee in his business or profession during the previous year, (i) for a period of 180 days or more (ii) for a period of less than 180 days but more than 30 days, or (Hi) for a period of thirty days or less than thirty days respectively....."*

*(Emphasis supplied)*

*4, It must be realised that what was being erected was a new plant though it was being erected by an existing company. The machines which were installed in the building in question in respect of which depreciation allowance is claimed became functional only on 7th March, 1965. The business of the company was to manufacture dyestuffs etc., The production of dyestuffs could not have commenced before 7th March, 1965, the date on which the machines became operative. Under the circumstances, can it be said that the building was used by the assessee for the purposes of his business at a point of time when the machines, had not become functional, merely because the machines had already been installed? In order to succeed, the assessee must establish—*

*(1) that the building in question was used for the purpose of his business, and*

*(2) that it was used for the purposes of his business during the relevant period.*

*Now, attention must be focussed on the expression "have been used by the assessee in his business or profession during the previous year". The emphasis is on "user" of the building "in the business of the assessee". Mere preparation for the user cannot amount to user. There must be actual, effective and real user in the commercial sense. And the user must be so linked with the business that it can be said that there is an immediate nexus between the user and the business, i.e., the real business of the assessee. The business of the assessee was to produce the dyestuffs etc. The building was used for the purpose of business of production of dyestuffs only after the machines became operative w.e.f. 7th March, 1965. Counsel for the assessee has argued that the machines had first to be installed before these machines could be operated. The user had, therefore, it is so argued, commenced on the date on which the installation was completed. In fact, if this arguments were valid, it can be said that the user had begun as soon as the work of installation had commenced regardless of when it was completed. In our opinion, there is a built-in fallacy in this argument. The fallacy will become evident if the argument is tested by envisioning an hypothetical situation. Take the case of a building which was completed, say in 1970, and the installation of the machinery was commenced in 1971, but could not be completed, for say five years thereafter, till 1974. Could it then be contended that the building was "used" for the purposes of the "business" of the assessee and could the assessee have claimed depreciation for these five years? Five years even before the machinery became functional and the plant was commissioned? In other words, even before it could have commenced trial production let alone actual production? The answer is obviously "no". Depreciation, it must not be overlooked, if inseparable from the actual user for business. And, depreciation allowance is permissible only on that account, it is not an allowance for natural wear and tear by reason of the aging process. In a way, every building must have started aging from the day it was constructed. But depreciation cannot be claimed in that behalf by way of compensation for such diminution in life span and value. It is claimable only on account of its user for business which can result in profits or gains. This can happen only when production commences. Another illustration may also make the position abundantly clear. Take the case of a factory which has totally dosed down its business operations for five years during which it does not operate the factory or work for profits or gain. Can depreciation be claimed for this period notwithstanding this factor? In our opinion, therefore, the commencement of the business by way of the production of the article for the manufacture of which the plant was being set up is an essential precondition for holding that the business of the company had started. If the business had not started till then, there was no question of claiming depreciation for using a particular building or machinery "in the business". A somewhat similar question had arisen before this Court in IT Ref. No. 205/74, decided on 19th Oct., 1978. (Addl. CIT vs. Speciality Paper Ltd.) Depreciation was claimed by the assessee with effect from the date on which trial production was commenced. It appears that there was a time lag between the date when the trial production commenced and the date when the actual production commenced. The Court took the view that the date on which the trial production commenced was irrelevant for the purposes of claiming depreciation and that it cannot be said that the company had set up its business at the point of time when the trial production had commenced. In other words, the company had not commenced its business from the standpoint of the right to claim depreciation for the user of a building or machine in the business of the assessee-company. Under the circumstances, the conclusion is inescapable that the Tribunal had committed an error in reversing the view taken by the ITO as confirmed by the AAC and in deciding the question in favour of the assessee. We, therefore, answer the question referred to us, as under:*

*Question :*



*"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the "Azo" building was used for the purposes of business for more than one month in the relevant accounting year for the assessment year 1965-66 and was entitled to depreciation in the said assessment year?"*

*Answer :*

*In the negative, i.e., in favour of the Revenue and against the assessee.*

*There will be no order regarding costs."*

4.3. In the case in hand also, although the appellant had purchased the building for business purpose and furnishing of the same was being carried out for actual use. Therefore, in view of the binding precedent of the Hon'ble Jurisdictional High Court in the case of CIT vs. Suhrid Geigy Ltd., we are not inclined to accept the arguments advanced by the Id. Sr. counsel for the assessee, same are hereby rejected on this issue. Thus, Ground Nos.1 to 4 of assessee's appeal are rejected.

10. From going through the decision of the Co-ordinate Bench we observe that the issue relating to "use of asset" has been discussed. The contention of the assessee is that the depreciation claimed is justified as the show room building was purchased on 5.3.2007 and it was started for business purposes by way of starting the interior work relating to 'Bath Studio' and, therefore, depreciation was claimed only to the extent of cost spent for show room building and the amount spent for Bath Studio was shown as capital work in progress. However, the Co-ordinate Bench confirmed the view of the Assessing Officer and Id. CIT(A) by following the judgment of Hon. Jurisdictional High Court in the case of CIT vs. Suhrid Geigy Ltd. (supra) and rejected the claim of depreciation. There is no dispute with regard to facts and figures but issue is only about the allowability of the claim.

11. Now in order to examine as to whether it is justifiable to impose penalty u/s 271(1)(c) of the Act on the disallowance of depreciation

we observe that assessee has furnished all necessary particulars relating to its claim of depreciation and there is no mistake detected by the lower authorities with regard to the cost of the asset, depreciation amount, work in progress of "Bath Studio" and date of completion of Bath Studio. Assessee's claim of depreciation is duly supported by the auditors report which further strengthens the claim of assessee that it was having some valid basis. It was only the other view taken by Id. Assessing Officer and confirmed by Id. CIT(A) and the Co-ordinate Bench that show room building was actually put to use after the completion of Bath Studio on 31.5.2007 and not on the date of purchase of show room building on 5.3.2007.

12. In the backdrop of above discussion crucial question which remains to be answered is "whether penalty u/s 271(1)(c) of the Act can be imposed when in the given circumstances there is no case of furnishing inaccurate particulars of income rather there is only a dispute about the claim of assessee which was made with some justification but was not accepted by the Revenue authorities?". We find that answer to the above question can be found in the judgment of Hon. Supreme Court in the case of Price Waterhouse Coopers Pvt. Ltd. vs. CIT in Civil Appeal No.6924 of 2012 wherein the Hon. Court observed as follows:-

17. Having heard learned counsel for the parties, we are of the view that the facts of the case are rather peculiar and somewhat unique. The assessee is undoubtedly a reputed firm and has great expertise available with it. Notwithstanding this, it is possible that even the assessee could make a "silly" mistake and indeed this has been acknowledged both by the Tribunal as well as by the High Court.

18. The fact that the Tax Audit Report was filed along with the return and that it unequivocally stated that the provision for payment was not allowable under Section 40A(7) of the Act indicates that the assessee made a computation error in its return of income. Apart from the fact that the assessee did not notice the error, it was not even noticed even by the Assessing Officer who

framed the assessment order. In that sense, even the Assessing Officer seems to have made a mistake in overlooking the contents of the Tax Audit Report.

19. The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appears to us that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income.

20. We are of the opinion, given the peculiar facts of this case, that the imposition of penalty on the assessee is not justified. We are satisfied that the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars.

21. Under these circumstances, the appeal is allowed and the order passed by the Calcutta High Court is set aside.

13. From going through the above judgment of Hon. Apex Court and analyzing the facts of the case in the appeal before us, we find that it is squarely covered in favour of assessee by the above judgment as the assessee which is a limited company declaring total income of Rs.11.43 crores (approx.) and having no *mens rea* of claiming excess depreciation of just Rs.7,80,826/- rather it was claimed in the regular course and with the firm belief that it is legally allowable which was further supported by the statutory audit report. It was only the Revenue's contention that the depreciation cannot be allowed on the show room building as it could not be deemed to be put to use on 5.3.2007 as claimed by the assessee but was put to use on 31.5.2007 after the completion of Bath Studio. Certainly in such circumstances it will be unjustified to impose penalty u/s 271(1)(c) of the Act as the assessee had only committed an undoubtful bona fide error and it certainly had no intention of

concealing any income or furnishing inaccurate particulars of income. We are, therefore, of the view that assessee should not be visited with penalty u/s 271(1)(c) of the Act on the disallowance of depreciation of Rs.7,80,826/-. We accordingly set aside the order of Id. CIT(A) and allow the assessee's appeal.

13. In the result, appeal of assessee is allowed.

Order pronounced in the open Court on 4<sup>th</sup> January, 2017

Sd/-  
(S. S. Godara)  
Judicial Member

sd/-  
(Manish Borad)  
Accountant Member

Dated 04/01/2017

Mahata/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Asst. Registrar, ITAT, Ahmedabad

1. Date of dictation: 03/01/2017
2. Date on which the typed draft is placed before the Dictating Member: 03/01/2017 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: \_\_\_\_\_
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk: 04/01/17
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: