

_ April 2020

To,
XXXX
XXXX
XXXX,
Mumbai

Dear Sir,

Re: XXXXXXXXXXXX. ('XXX' or 'Assessee')
PAN – xxxxxx
Assessment Year ('AY') XXXXX

Sub: XXXXXXXXXXXX

A. Background/ Facts of the case

1. The Assessee is engaged in the business of XXXXXXXXXXXX and return of income was filed on XXXXXXXXXXXX declaring a loss of Rs. XXXXXXXXXXXX. (Copy of return of income and computation of income attached at page no **1 to 34** of the paperbook).
2. During the year under consideration, the Assessee XX.
3. The assessee claimed the interest expense of XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX expense in the books of accounts and in the return of income. (Copy of the details submitted attached at page no **57 to 59** of the paperbook).
4. During the year, the assessee had XXXXXX income from operations thereby incurring a loss of XXXXXXXXXXXXXXXXXXXX.

B. Penalty proceedings

5. The AO initiated the penalty proceedings for the disallowance made in the assessment order of interest u/s XXXXX of the Act and also issued show cause notice dated XXXXXX under section XXXXXX of the Act, as to why penalty should not be levied under section XXXXX of the Act for concealment of particulars of income or furnishing inaccurate particulars of income.
6. The AO concluded that the assessee had bloated the figures of expenses debited to the Profit and loss account and this resulted in loss of income to the assessee and thereby there was concealment of income to this extent.
7. AO held that there was enough material brought on record to prove that the Assessee had made a conscious attempt to evade taxes by furnishing inaccurate particulars of income and accordingly, levied a penalty at 150% of the tax amount amounting to Rs.XXXXX/-

C. Our submissions

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Legal Submission

I. Penalty order under section XXXXX would be invalid if inappropriate portion of the notice has not been struck off by the AO/CIT(A)

8. The Assessee submits that the AO while issuing notice under section XXXXXXX of the Act has to come to the conclusion that XXXXXXXXXXXXXXXXXXXX.
9. The AO in its assessment order passed under section XXXXXXX of the Act while initiating penalty proceedings has XXXXXXXXXXXXXXXXXXXX.
10. **However, while issuing the show cause notice issued under section XXXXXXXXXXXXXXXXXXXX, the AO has not XXXXXXXXXXXXXXXXXXXX. Copy of the penalty notice is enclosed at page no. 49 of the paperbook.**
11. Further, while passing order under section XXXX the AO held as under :

XXXXXXX
12. Accordingly as it can be seen from the above, the AO was not consistent in his stand and has not made clear/ specified the reason XXXXXXXXXXXXXXXXXXXX.
13. Accordingly, Assessee filed cross objection against the Department's appeal, to challenge the validity of penalty order itself as the AO was not consistent in his stand and has not made clear/ specified the reason XXXXXXXXXXXXXXXXXXXX.
14. Reliance in this regard is placed on the decision of the Tribunal in case of XXXXXXXXXXXXXXXXXXXX, wherein Tribunal has deleted the penalty as the AO did not strike off the inappropriate portion of reason for levying the penalty. The finding of Tribunal is as under:

XXXXXXX
15. Further, reliance is placed on the following decisions, wherein on similar situation, the penalty order is being quashed by the courts:
 - XXXXXXXXXXX
 - XXXXXXXXXXX
 - XXXXXXXXXXX
16. In view of the above, penalty order which is passed on the basis of invalid notice and without application of mind by the AO, should be quashed.

II. Penalty cannot be levied in absence of tax sought to be evaded

17. During the year, the assessee has filed XXXXXXX.
18. Further, as per section XXXXX of the Act read with Explanation X thereto, as it read prior to substitution by the XXXX, provides as under :

XXXXXXXXXX

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19. Accordingly, for levying of penalty under section XXX of the Act, there should be tax sought to evaded which shall fall under any of the above 3 clauses. The same are analyzed with respect to the facts of the present case as under :

XXXXXXXXXXXX

20. In this regard, assessee would like to rely on the decision of **Bombay High Court in case of XXXXXXXXXXXX (Refer page 127 to 136 of the paperbook)** which is directly applicable to the facts of the present case wherein the High Court setting aside the penalty order under section XXXXXX held that XXXXXXXXXXXX. The facts and the issue are summarized below :

XXXXXXXXXXXXXXXXXXXX

21. Accordingly, facts of the present case are identical to the facts present in the above judgment of the Bombay High Court. As stated earlier, in the present case too, assessee had filed a belated return claiming a loss and XXXXXXXXXXXXXXXXXXXX.

22. Reliance is placed on the following decision:

- XXXXXXXXXXXX

23. Therefore, following the decision of the Bombay High Court and provisions of the law, it is submitted by the Assessee that there was no tax sought to be evaded and accordingly, no penalty could be levied.

III. No penalty where there is full disclosure of facts

24. It is submitted that the assessee has shown the XXXXXXXXXXXXXXXXXXXX.

25. Further, we would like to submit that as the facts pertaining to the said interest expenses were XXXXXXXX. In this regard, we would like to rely upon the following documents:

- XXXXXXXXXXXX

26. Therefore, it is clear that there is full and proper disclosure with regard to interest expense. The provisions of XXX of the Act are attracted where in the course of any proceedings under the Act, the AO or the first appellate authority is satisfied that any person has either;

- XXXXXXXX

27. The expressions “has concealed the particulars of income” and “has furnished inaccurate particulars of income” have not been defined either in this section or elsewhere in the Act. However, on perusal of various judicial precedents, under the following circumstances, an assessee would be deemed to have concealed income or furnishing of inaccurate particulars of income:

- XXXXXXXXXXXX

28. Thus, there is no concealment or furnishing of inaccurate particulars if:

- XXXXXXXXXXXXXXXX

29. The Hon'ble Apex Court in the case of XXXXXXXXXXXX (Refer page 141 to 145 of the **paperbook**) has held the following in connection with penalty on account of making an incorrect claim in law would not tantamount to furnishing of inaccurate particulars

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XXXXXXX

30. We would also like to rely upon decision of Tribunal in case of XXXXXXXXXXXX has held as under:

XXXXXX

31. The said order of the Mumbai Tribunal has been approved by the Hon'ble Bombay High Court vide XXXXXXXX wherein it was held as under :

XXXXXXX

32. Further, reliance is also placed on the following decisions wherein it is held that penalty cannot be levied if the assessee has fully disclosed the facts before AO during the course of assessment proceedings:

- XXXXXXXXXXX

33. Applying the above ratio in the present case, we once again wish to submit that the Assessee had furnished all information and explanations from time to time and hence, penalty levied on account of concealment of income or furnishing inaccurate particulars of income should be deleted.

IV. Merely on non-filing of appeal to buy out peace and avoid litigation, does XXXXXX.

34. Further, the assessee would like to state that merely because the assessee has not preferred an appeal against the assessment order passed, it should not result in automatically levy of penalty. In this connection, the assessee would like to rely in the following judicial precedent.

- XXXXXXXXXXXXXXXX

V. Mere addition made in the appellate order will not automatically justify the imposition of penalty under section XXXX of the Act

35. The Assessee respectfully submits before your Goodselfs that it is a well settled principle of law that penalty proceedings are separate and distinct from the assessment/ appellate proceedings and the mere fact that some addition or disallowance has been made in the assessment/ appellate order will not automatically justify the imposition of penalty under section XXXXX of the Act. Reliance in this regard is place by the Assessee on the following decisions:

- XXXXXXXXXXXXXXXX

36. Your Goodselfs would also appreciate that circumstances under which the penalty has been levied by the AO in the case of the Assessee are purely mechanical in nature and without independently examining as to whether inaccurate particulars of income have been furnished by the Assessee.

VI. The learned AO has placed incorrect reliance on the decision of XXXXXXXX

37. The learned AO in the order passed under section XXXX of the Act has also placed reliance on decision of XXXXXX

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38. In this regard, we invite your Goodselfs attention to the decision of the Jurisdictional High Court in case of **XXXXXXX** :

XXXXXXX

39. In view of the above, our Goodself would appreciate that circumstances under which the penalty has been levied by the learned AO in the case of the Assessee are purely mechanical in nature and without independently examining on whether inaccurate particulars of income have been furnished by the Assessee. That apart, the Assessee would also like to highlight before your Goodselfs that apart from the reason that addition has been accepted by the Assessee and no appeal has been preferred against the same, there was no other cogent reason available with the learned AO to levy penalty in the present case.

Merits of the Case

i. No interest disallowance under section XXXXXXXX

40. The Assessing officer while passing order XXXXXXXXX stating that the said interest expenditure was incurred XXXXXXXXXX..
41. In this regard assessee would like to submit before the Hon'ble Tribunal that Section XXXXXXXXX
42. Accordingly, where interest is paid in respect of XXXXXXXXXXXXX.
43. Further, even amendment to section XXXXXXXXX would not make difference as the capital is borrowed for the purpose of business (i.e. purchasing inventory) and not for the acquisition of any capital asset. Therefore, no disallowance can be made under section XXXX of the Act.
44. Reliance in this regard, is placed on the following decisions wherein it was held that interest expense incurred for the XXXXX is allowable expense u/s XXXX of the Act :
- XXXXXX

ii. No interest disallowance under section XXX for interest expenditure where XXXXX

45. **Without prejudice to the above**, even assuming that the XXXXXX. Assessee in the present case, has XXXXX ready to use form directly from third party and hence the question of applying proviso to section XXXX the Act does not apply as the asset is XXXXX.
46. Further, proviso to XXXXX provides that the interest shall be disallowed from the date on XXXXXXXXX. :
47. The decision of Supreme Court in case **XXXXXX** held as under :

XXXXX

48. Further, the Hon'ble Bombay High Court in the case of **XXXX (Refer page 171 to 173 of the paperbook)** has held that :

XXXXX

49. Further, many other judgements have held depreciation would be allowed where the asset was ready to be used. Reliance is placed on the following decisions :

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- XXXXX

50. Further, reliance is also placed on the decision of Supreme Court in case of XXXX (**Refer page 169 to 170 of the paperbook**) wherein Supreme Court has held that interest paid in respect of XXXXX is allowable deduction XXXX of the Act.
51. Accordingly, in view of the above Supreme Court decisions and various other judgements of Courts, where an asset is purchased XXXXXX..
52. In view of the above, there can be no disallowance XXXXX of the Act could be made.

Prayer

In light of the above submission, the Assessee prays before your Goodself that the learned AO be directed to delete the penalty levied under section XXXX of the Act.

In case you require any further clarifications, please let us know.

Yours faithfully,

For XXXXXX

Authorized Signatory