

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER
ITA No. 141/SRT/2021 (AY 2015-16)
(Hearing in Virtual Court)

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| Shree Hari Processors India Pvt. Ltd., Block No.99/P, Post Tatithaiya, Tal-Palsana, Surat-394 372 e-mail:jain_tex@yahoo.com PAN : AADCA 1313 N | Vs | Income Tax Officer, Ward-2(1)(2), [New ITO WD 2(1)(3)] Aayakar Bhawan, Majura Gate, Surat-395001 |
| Appellant / assessee | | Respondent / Revenue |

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| Assessee by | Shri Suresh K.Kabra, C.A |
| Revenue by | Shri Sita Ram Meena, Sr-DR |
| Date of hearing | 10.02.2022 |
| Date of pronouncement | 10.02.2022 |

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee is directed against the order of learned Commissioner of Income-tax (Appeals) / National Faceless Appeal Centre Delhi (in short CIT(A)/NFAC), dated 12.08.2021, which in turn arises from order of penalty levied by assessing officer (A.O.)/Income Tax Officer, Ward-2(1)(2) Surat, under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') dated 20.03.2018 for assessment year (AY) 2015-16. The assessee has raised the following grounds of appeal:-

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| 1 | <i>The Ld Faceless CIT(A) has erred and was not just and proper on the facts of the case and in law in confirming the penalty u/s 271(1)(c) of the Act</i> | Rs.7,55,913/- |
| 2 | | |
| | <i>The penalty of Rs.7,55,913/- may be kindly deleted</i> | |
| | <i>Any other relief that your honours may deem fit maybe granted</i> | Nil |
| 3 | <i>The assessee craves leave to add, amend, modify alter or delete any of the grounds at the time of hearing</i> | |

2. Brief facts of the case are that assessee at the time of filing its return of income for AY 2015-16 declared loss. The case was selected for scrutiny. During the assessment, the Assessing Officer recorded that assessee has shut down its manufacturing business and land & building were given to various parties on rental basis. The assessee was asked to furnish the rent agreement. On examination of rent agreement, the Assessing Officer noted that in the rent agreement, assessee has not shown to have let out machineries on rent. However, assessee has claimed depreciation on certain plant and machinery in its profit and loss account. The Assessing Officer issued show cause notice that assessee is not eligible for depreciation under section 32 of the Act. Accordingly, show cause notice dated 15.09.2017 to the assessee as to why

depreciation claimed by assessee should not be disallowed. The assessee filed its reply dated 25.09.2017, the assessee submitted that earlier the assessee was in manufacturing business which is shut down and only trading activities in the form of sale of stock is carried out. The assessee in order to curtail huge losses and to prevent the machinery from rust, the building alongwith installed machineries was let out to various parties. The assessee offered the rental receipt as business income and claimed depreciation. The assessee specifically contended that the machineries were also given on rent alongwith building but somehow it does not find place in the rent agreement. The assessee also stated that after insertion of block system, the assets got subsumed in specific block and even if single machine is ready to put to use for the purpose of business, depreciation is allowable. The reply of assessee was not accepted by Assessing Officer by taking view that assessee is not carrying out any business activities. Therefore the claim of depreciation is not allowable. The Assessing Officer disallowed the depreciation and initiated penalty under section 271(1)(c) while passing the assessment order on 29.09.2017.

Subsequently, the assessment order was rectified under section 154 vide order dated 17,11,2017 and business income offered by assessee on account of rent receipt was treating as income from “house property” and standard deduction @ 30% was allowed. Thereafter, the Assessing Officer issued show cause notice under section 274 read with section 271(1)(c) for levying the penalty vide notice dated 29.09.2017 and again on 08.12.2017. The assessee filed its reply vide its reply dated 06.02.2018. The contents of reply is not recorded by Assessing Officer. The Assessing Officer only recorded that reply of assessee was given due consideration but not tenable. The Assessing Officer after explaining meaning of word “concealment” held that assessee has not carried out any business activities and hence, the depreciation was disallowed and was added to the total income of assessee. The Assessing Officer levied the penalty @ 100% of the amount of tax attributable. The Assessing Officer worked out the penalty of Rs.7,55,913/-in its order dated 20.03.2018.

3. Aggrieved by levy of penalty, the assessee filed appeal before Ld. CIT(A), which was adjudicated by National Faceless Appeal

Centre, Delhi ('NFAC' for short), Before Ld.NFAC/CIT(A) the assessee filed its detailed written submission. The submissions of assessee is recorded in para-4 of impugned order. In the submission, the assessee in sum and substance stated that they claimed depreciation on the block of asset at Rs.24,46,320/-. The depreciation schedule as a part of the audited statement was enclosed. The assessee was under *bona fide* belief that plant and machineries were let out on rent and that depreciation is allowable. The machineries were installed in the process house property and these were not removed from the premises. The plant & machinery were sold in financial year 2017-18 relevant to AY 2018-19 and Short Term Capital Gain/Loss was offered to tax in the relevant assessment years. Which also establishes the *bona fide* claim of assessee. The Assessing Officer disagreed with the submission and disallowed the depreciation and treated the rental income as income from "house property" instead of 'business income'. The Assessing Officer rectified his order under section 154 of the Act and allowed the deduction @ 30% which was not allowed at the time of disallowance of

depreciation. The assessee was taxed under Minimum Alternative Tax (MAT) under section 115JB of the Act. The assessee's claim was not found to be false, exaggerated or wrong but disallowed by Assessing Officer. The assessee also given explanation on various provisions section 271(1)(c) of the Act. The assessee finally submitted that there cannot be no dispute that having depend upon the return filed because the only document where assessee can furnish the particular of income and when such particulars are found to be inaccurate, the liability would arise. The assessee relied on the decision of Hon'ble apex court in the case of Commissioner of income-tax, Vs. Reliance Petroproducts (P) Ltd. (2010) 189 Taxmann 32 (SC)/[2010] 322 ITR 158 (SC).

4. The ld. NFAC/CIT(A) after considering the assessment order, rectification order passed under section 154, submission of assessee held that assessee in its submission stated that it was a *bona fide* belief that plant & machinery was given on rent and depreciation is allowable and assessee also stated that claim of depreciation was otherwise proper or incorrect. The Ld. NFAC/CIT(A) by referring the decision of *Sundaram Finance*

Ltd. vs. Deputy Commissioner of Income-tax (2018) 99
taxmann.com 152 (SC), wherein it was held that when assessee claims depreciation on non-existent asset, penalty under section 271(1)(c) was to be levied for filing inaccurate particulars of income. The Ld. NFAC/CIT(A) in para 6.5 recorded that assessee closed its manufacturing business and gave the land & building to various parties on rental basis and claimed depreciation which constitutes “*furnishing of inaccurate particulars of income*” and upheld the action of Assessing Officer. Further aggrieved assessee has filed present appeal before this Tribunal.

5. We have heard the submission of Ld. Authorized Representative (AR) for the assessee and Ld. Sr. Departmental Representative (Sr.DR) for the Revenue and have gone through the orders of authorities below. The Ld. AR of the assessee submits that the assessee was in a manufacturing business and suffered huge losses in its business and in order to curtail heavy loss and to protect the plant & machinery from deteriorating, the assessee let out the land & building alongwith plant & machinery to M/s Shri

Hanumant Life Style Pvt.Ltd.,M/s Shri Baba Dharshu Creation Pvt. Ltd., and M/s J.P. Creation at a monthly rent of Rs.20,000/- each. Though, the assessee also lets out its plant & machinery, but such averments due to inadvertent was not recorded in the lease deeds. The assessee offered rental income as 'business income' and claimed depreciation on plant & machinery. The assessee made *bona fide* claim. The *bona fide* of assessee proved by the fact that the plant & machinery was sold in AY 2018-19 and related to Short Term Capital Gain/Loss was offered to tax. There was no incorrect claim or concealment of income at the time of filing its return of income. The Assessing Officer treated the said business income as income from "house property" and allowed standard deduction @ 30% on disallowance of depreciation. The Assessing Officer levied penalty @ 100% of amount of tax sought to be evaded. The mere fact the assessee's claim of depreciation, which was not accepted by Assessing Officer would not attract penalty under section 271(1)(c) of the Act. The Assessing Officer while making disallowance of depreciation has not investigated the fact that the plant & machinery were in fact lease out to the

tenant, which were sold in AY 2019-20 and Short Term Capital Gain/Loss was accepted by Revenue and no information in the return of income was found to be inaccurate particulars of income or incorrect. The disallowance of depreciation was due to the fact that assessee has not done any business during the year. To support his submission, Ld. AR of the assessee relied upon various case laws of Hon'ble Apex Court and Hon'ble High Courts;

- CIT Vs. Reliance Petroproducts (P) Ltd. [2010] 189 Taxman 322/ [2010] 322 ITR 158 (SC)
- PCIT Vs. Financial Technologies India Ltd. [2020] 113 taxmann.com 152 (SC)
- CIT Vs. Royale Manor Hotels & Ind. Ltd. [2014] 41 taxmann.com 491 (Guj)
- PCIT Vs. Himalayan Expressway Ltd. [2019] 109 taxmann.com 262 (P&H)
- PCIT Vs. Financial Technologies Ltd. [2019] 112 taxmann.com 398 (Bom)

6. On the other hand, Ld. SR-DR for the Revenue supported the order of authorities below. He submits that the Assessing

Officer while levying penalty clearly held that assessee was not having any business taxable under the head “business and profession”. Admittedly, no business was carried out by the assessee during the year. In the rent agreement produced by assessee, there was no reference for letting out of plant & machinery. The Assessing Officer levied the penalty for furnishing inaccurate particulars of income and no appeal was filed by assessee against such disallowance of depreciation. The Ld. SR-DR submits that the case of assessee is clearly covered by the decision of Hon'ble apex court in the case of Sundaram Finance Ltd. (supra) related by Ld. NFAC/CIT(A) in his order.

7. We have considered the rival submission of both the parties and have gone through the orders of authorities below. We find that there is no dispute that during the year the assessee was not carrying out any business activities. The case of assessee throughout proceedings are that assessee has let out its business premises to various parties alongwith plant & machinery and income earned on letting out was offered for tax under the head business income from “business profession”

and the assessee was under bona fide belief that the depreciation is allowable of the block of asset. The assessee claimed depreciation on certain block of assets (plant & machinery). The Assessing Officer disallowed the depreciation by taking view that there is no reference of letting out of plant & machinery in the lease deed.

8. We find that the Assessing Officer disallowed the depreciation on the basis of contents of lease deed. And admittedly no verification of fact about the claim of assessee that plant & machinery is installed in the let out premises or the plant & machinery was not ready to use. We further find that before the Ld. NFAC/CIT(A), the assessee specifically contended that such machines which was a part of block assets or were sold during the AY 2018-19 and Short Term Capital Gains/Loss thereon offered for taxation. The Ld. NFAC/CIT(A) has not given any finding on such facts. The Ld. NFAC/CIT(A) confirmed the order of Assessing Officer by referring the decision of Sundaram Finance Ltd. (supra) with utmost regard to the said decision, we find that ratio of said decision was not applicable on the fact of the present case. In the said case there was no

asset exist on which depreciation was claimed. However, in the present case, the assessee throughout proceeding, the claim that the asset on which depreciation was claimed is existed and was sold only in AY 2018-19 and earned Short Term Capital Gains/Loss thereon was offered to tax.

9. Now adverting to specific fact of the present case, the assessee while filing its return of income offered the rental income as “business income”. The Assessing Officer treated the rental income as “business income” primarily on the fact that the assessee was not doing any business activities and that plant & machinery were not shown in the lease deed. The Hon'ble Jurisdictional High Court in CIT Vs Rayale Mannor Hotel & Ind Ltd (supra) held that where there was no intention of the assessee to claim wrong deduction of depreciation on hotel building, and mistake was bona fide penalty could not be imposed.

10. Now applying such ratio on the facts of the present case as the claim of assessee is that they have let out its business premises to various parties alongwith plant & machinery and income earned on letting out was offered for tax under the head

business income from “business profession” and the assessee was under bonafide belief that the depreciation is allowable of the block of asset, we find merit in the submission of Ld. AR for the assessee that the assessee made a bonafide claim and mere disallowance thereof would not lead to conclusion that the assessee furnished inaccurate particulars. Thus, in view of the above factual and legal discussion, the grounds of appeal raised by the assessee are allowed.

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

Order pronounced in the open court on 10/02/2022 and result was also placed on notice board.

Sd/-
(Dr ARJUN LAL SAINI)
ACCOUNTANT MEMBER
Surat, Dated: 10/02/2022
Dkp. Out Sourcing Sr.P.S

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

By order

// True Copy //

Assistant Registrar, ITAT, Surat